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Supreme Court, U.S.
FILED

001863 JUN 12 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

COUNTY OF LOS ANGELES and
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

vs.

VALERIE ANN STREIT, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a county government is liable under 42 U.S.C. § 1983 for a sheriff's law enforcement activities, including operation of the jails, where state law provides that the sheriff is a state officer and does not vest law enforcement authority in the county government.

2. Where there is a split between the federal and state appellate courts over whether sheriffs in California act on behalf of the state or the county in setting county jail policy for section 1983 purposes, do considerations of comity require deference to the state appellate courts' interpretations of the state constitution and laws on this important issue?

LIST OF PARTIES

The petitioners and defendants involved in this consolidated petition are County of Los Angeles and Los Angeles County Sheriff's Department. The respondents and plaintiffs are Valerie Streit, Diego Santillana and Michael Roerich for the lead case.[1]

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[1] Respondents and plaintiffs in the related cases (consolidated appeals) are as follows: Eddie Shields, Randall Cleaves, Alfred Carrillo, Munique Williams, Michael E. White, April Marie Courie, Eric Mitchell, Diane Ramirez, Heather Yousif, Margo V. Borrup, Quinton Cooper, Ruby Sellars, Leellen Patchen, Steven Gray, Isaac Tchakmakjian, Johnny Ray Tolbert, Kevin Baxter, Joseph Whitner, Yolanda Corbert, Ronald J. Borrup, Kirk Douglas, Julian Valdez, Frank Lopez, Joe Sanchez, Jr., Moises Carranza, Hamid Shahian, Herman Wyche, Regina Lanell Reed and Roy Lee Wimberly. (App. A1-A6.)

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PETITION FOR WRIT OF CERTIORARI

The County of Los Angeles and the Los Angeles County Sheriff's Department respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit filed on January 12, 2001, in order to resolve a direct conflict between the Ninth Circuit Court of Appeals and the California Court of Appeal on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was reported at 236 F.3d 552 (CA9 2001). It is reprinted in Appendix "A" hereto. (App. A.) By order filed March 14, 2001, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. (App. F7.)

JURISDICTION

On March 25, 1999, the United States District Court of the Central District of California issued a memorandum order denying the County of Los Angeles and Los Angeles County Sheriff's Department's (collectively "defendants") motion to dismiss, rejecting defendants' argument that the sheriff acts as a state and not a county official when setting policies relating to law enforcement, including operation of the jails. (App. B.) The district court subsequently granted the defendants' motion for an

order to certify for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on May 25, 1999. (App. C3.) On July 26, 1999, the Ninth Circuit granted permission to file an interlocutory appeal to the district court's order and the interlocutory appeals were thereafter consolidated. (App. A13, D1, E3.)

Defendants timely appealed to the Ninth Circuit, which affirmed in a published opinion filed on January 12, 2001. (App. A.) On March 14, 2001, the Ninth Circuit denied the defendants' timely filed motion for rehearing and suggestion for rehearing en banc. (App. F.) Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of hearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS

The following statutory and constitutional provisions relevant to this petition are set forth in the Appendices as follows:

42 U.S.C. § 1983

California Constitution, Article V, § 13

California Civil Code § 22.2

California Government Code § 200

California Government Code § 201

California Government Code § 202

California Government Code § 203

California Government Code § 12524

California Government Code § 12550

California Government Code § 12560

California Government Code § 23013

California Government Code § 25303

California Government Code § 26605

California Penal Code § 4015

STATEMENT OF THE CASE

This petition arises from several related civil actions under 42 U.S.C. § 1983 by plaintiffs who seek to hold the County of Los Angeles and the Los Angeles County Sheriff's Department liable for the allegedly unconstitutional policies of the Los Angeles County Sheriff. Plaintiffs and respondents are former inmates of the Los Angeles County ("County") jails, were held in the County jails at different times and under different circumstances, who all claimed that they were not timely released from custody following a court order or other authority for their release. Plaintiffs seek damages on behalf of themselves and a similar proposed class of persons for such alleged "overdetentions" – though class certification has not been granted in any of the cases. Plaintiffs seek such relief against the County of Los Angeles, the Los Angeles County Sheriff's Department and several individual defendants including then Sheriff, Sherman Block (now deceased). Each of the respective complaints in the instant cases set forth causes of action both under 42

U.S.C. § 1983 and state law for the alleged overdetentions.

Defendants and petitioners County of Los Angeles and Los Angeles County Sheriff's Department (hereinafter "defendants") brought motions to dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6) seeking dismissal of the claims against them brought pursuant to section 1983. Defendants, citing the California appellate court case *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr. 860 (1998), *review denied* (March 17, 1999),[2] asserted that, under state law, the Los Angeles County Sheriff acts on behalf of the State of California, not the County of Los Angeles, in formulating jail release policies, practices or customs. Defendants argued that because the Sheriff is not a final policymaker for the County in these actions, neither the County nor the Sheriff's Department can be subject to section 1983 liability under *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018 (1978), as a matter of law.

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[2] The appellate court in *Peters* utilized the analytical framework set by this Court in *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734 (1997) (Alabama Sheriff acted on behalf of the State of Alabama when overseeing local jails) and the California Supreme Court in *Pitts v. County of Kern*, 17 Cal.4th 340, 949 P.2d 920, 720 Cal.Rptr.2d 823 (1998) (District Attorney acted on behalf of the State of California, and not the local counties, when prosecuting violations of state law) – in holding that sheriffs in California act on behalf of the State, and not counties, in setting policies on releasing persons from county jail. *Peters*, 68 Cal.App.4th at 1178.

The district court denied defendants' motions in all the related cases finding that the Sheriff is a final policymaker for the County even though, as the California appellate court has recognized, the County Sheriff acts as a state official performing state law enforcement duties and not as a policymaker on behalf of the County "in setting policies concerning release of persons from the Los Angeles County jail." (App. B7, B11.) The district court rationalized reaching an opposite conclusion to that of the state appellate court by finding a purported distinction between the sheriff's "law enforcement duties" and the sheriff's "operational or administrative duties." (App. B8.)

The district court certified the orders denying defendants' motions to dismiss in five of the cases for immediate appeal pursuant to 28 U.S.C. § 1292(b), finding that there was "a substantial ground for difference of opinion as to whether the sheriff is acting on behalf of the County or State when effectuating the release of prisoners who are entitled to be released." (App. C10.) The Ninth Circuit subsequently granted permission to take an interlocutory appeal.[3] (App. D.)

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[3] Concurrently, defendants also filed notices appealing the orders denying the respective motions in all of these cases on the bases that the district court's orders were immediately appealable pursuant to 28 U.S.C. § 1291 and the collateral order exception to the final judgment rule. *See, Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226 (1949). As such, the Ninth Circuit had jurisdiction over all of the appeals pursuant to 28 U.S.C. § 1291 as well as 28 U.S.C. § 1292(b).

On appeal, the Ninth Circuit Court of Appeals affirmed the denial of defendants' motions to dismiss in a published opinion. (App. A.) The court of appeals determined that the Los Angeles County Sheriff acts as the final policymaker of the County of Los Angeles, rather than an official of the State of California, in administering jail policy concerning release of prisoners. (App. A28.) The basis for the court of appeals' opinion was both straightforward and superficial. In the court of appeals' view, because the Sheriff looks more like a County official than a State official, the County should be held liable under section 1983 for the Sheriff's activities relating to enforcement of state law, including maintaining the local jails.

The court of appeals initially attempted to draw a "subtle" distinction between a sheriff "[a]cting upon a warrant [which] is a law enforcement function" (which is tasked under California state law per California Government Code § 12560) and "[s]earching for wants and holds that may or may not have been issued" properly (for which the Sheriff answers to the County) (App. A26-27) in an attempt to distinguish the state appellate court's holding in *Peters*. The court of appeals, however, ultimately held that "even if the case were on all fours we would not be bound by *Peters'* conclusion regarding section 1983 liability because such questions implicate federal, not state, law." (App. A27.)

The only way for the Ninth Circuit to have arrived at a decision contrary to the state appellate court on the same issue was to employ an analysis rejected by this Court in *McMillian*, i.e., an analysis which focused upon the characterization or mere "label" of the sheriff as a

"county" official rather than on the controlling question, i.e., whether the County or the State can "control" the sheriff with regard to the function at issue. In so holding, the Ninth Circuit ignored the actual distribution of authority over law enforcement under California law and thus, consequently, ignored the real issue that must be addressed in order to determine if the Sheriff is a "policy-maker" for the County as required by *Monell, supra* and its progeny.

REASONS FOR GRANTING THE WRIT

There is currently a split between the federal and state appellate courts over whether California sheriffs act on behalf of the state or county in setting county jail policy. The Ninth Circuit's decision should be reviewed to resolve the conflict it has created with the state appellate court as well as the California court of last resort on the proper analysis to be applied in the determination of whether a particular county officer is a policymaker for the state or county government for purposes of section 1983. In refusing to be "bound" by the state appellate court's determination, based on the same California statutes, that sheriffs are state rather than county officials when setting policies on releasing persons from county jail, the published decision raises serious concerns relating to principles of state sovereignty and comity. Moreover, in reaching a contrary conclusion, the Ninth Circuit in this case employed an analysis disapproved by the California Supreme Court in *Pitts* and rejected by this Court in *McMillian*, i.e., an analysis which focused upon the mere "label" of the sheriff as a "county" official rather

than on the controlling question, i.e., who actually *controls* the conduct of the county officer.

I. THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH CALIFORNIA LAW WHICH HOLDS THAT A SHERIFF IS A STATE, NOT A COUNTY, POLICYMAKER WHEN PERFORMING LAW ENFORCEMENT ACTIVITIES, INCLUDING OPERATING LOCAL JAILS.

This Court has made it abundantly clear that the question of whether an official has policymaking authority and whom that official has policymaking authority for is ***wholly dependent*** on an analysis of state law. *See McMillian, supra,* 520 U.S. at 781. This Court's conclusion in *McMillian* that the Alabama county sheriffs act as agents of the state was "*dependent* on the definition of the official's functions under relevant *state law.*" *Id.* at 781 (emphasis added); *see also, Jett v. Dallas Indep. School Dist.,* 491 U.S. 701, 737, 109 S.Ct. 2702, 2724 (1989) (White, J., dissenting) ("whether a particular official has 'final policymaking authority' is a question of *state law*"); *accord, City of St. Louis v. Praprotnik,* 485 U.S. 112, 124, 108 S.Ct. 915, 924 (1988) (Brennan, J., concurring) ("identification of policymaking officials is a question of state law"). As this Court has recognized, it is therefore "entirely natural" that sheriffs may be deemed county officers in some states but state officers in others. *McMillian, supra,* 520 U.S. at 785.

Thus, while federal law provides the basis for interpreting 42 U.S.C. § 1983, federal law itself clearly

provides that ***state law*** controls the scope of section 1983 liability inasmuch as state law defines the "actual function of a governmental official." *Id.* at 786. In fact, this Court has unequivocally stated that "identification of policymaking officials is ***not a question of federal law***. . . . " *Praprotnik*, 485 U.S. at 124 (emphasis added).

Furthermore, this Court has long held that " 'an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*' " *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782 (1967) (original emphasis) citing *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183 (1940); *see also, Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537 (CA9 1996). Finally, this Court has recognized that policy and comity generally favor federal courts to give deference to state appellate courts' interpretations of state law. *Kolender v. Lawson*, 461 U.S. 352, 355-56, 103 S.Ct. 1855, 1857 (1983);[4] *see also, City of Meridian v. S. Bell*

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[4] *See also, Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022, 102 S.Ct. 557 (1981) (dissent by Chief Justice Berger, joined by Justices Powell and Rehnquist):

> "The policies of federalism and comity militate in favor of affording state judges – who are as capable as are federal judges of enforcing the Constitution of the United States, and have taken the same oath to do so – the initial opportunity to consider the scope and validity of state statutes. This is particularly so when the state law under consideration has never been applied, and when its interpretation is uncertain; in such a case the state court's construction of the statute may obviate the need for adjudication of the federal

Tel. & Tel. Co., 358 U.S. 639, 641, 79 S.Ct. 455, 457 (1959) (proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminarily to a federal court's consideration of the underlying federal constitutional questions).

Contrary to the foregoing controlling principles, the Ninth Circuit in this case imposed its own interpretation of state law in direct contravention of California's interpretation of its own constitution and statutes. As discussed below, an examination of California law reveals that sheriffs in California do not speak for the counties in the area of law enforcement, because their authority over law enforcement does not emanate from the boards of supervisors (the governing bodies for the counties) and cannot be withdrawn by the boards of supervisors. Application of the proper analysis by the Ninth Circuit in this case would have yielded the same result as the California appellate court in *Peters*, i.e., that only the State, not the County through the Board of Supervisors, has the right to control the Sheriff with regard to activities relating to enforcing state law, including the administration of local jails.

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constitutional issues, or the state court may resolve those issues as we would."

Id. at 1024.

A. A State Appellate Court, Using The Framework Set By This Court In *McMillian* And The State's Highest Court In *Pitts*, Has Analyzed The Same Issue Presented By The Ninth Circuit And Reached An Opposite Conclusion.

Using the framework set by this court in *McMillian*, the California Supreme Court in *Pitts* addressed the issue of whether a County employee who is also a State constitutional officer functions as a policymaker for the State or the County for purposes of the County's *Monell* liability under section 1983. *Pitts*, 17 Cal.4th at 356-57. In holding that district attorneys are controlled by the State, not the County, despite numerous provisions of California law that label district attorneys as "county" officers, the *Pitts* court noted the following: (1) district attorneys are supervised by the Attorney General; (2) the County Board of Supervisors is statutorily barred from obstructing the district attorneys' investigative or prosecutorial functions; and (3) the powers and duties of counties include no provisions in the area of law enforcement. *Id.* at 356-59.

Following the rules of both *McMillian* and *Pitts* and conducting a careful analysis of both California constitutional and statutory law, a three-judge panel of the California appellate court in *Peters* found that the same or parallel provisions which gave State control over district attorneys of the individual counties also give the State control over the sheriffs of the individual counties. *Peters*, 68 Cal.App.4th at 1178. Moreover, the *Peters* court found that the specific function at issue in that case, like the instant case, i.e., operation of the county jails, clearly falls within the realm of functions over which the State, not

the Board of Supervisors, exercises control.[5] Specifically, the California appellate court concluded that "in setting the policies **governing release of prisoners** from the Los Angeles County jail, the Los Angeles County Sheriff acts as a state official rather than a policymaking official of the County of Los Angeles." *Id.* at 1178 (*emphasis added*). For that reason, the California appellate court held the County could not be sued under section 1983 in *Peters* or "other similar cases." *Id.*

In reaching a contrary conclusion, the Ninth Circuit in this case employed an analysis rejected by this Court in *McMillian*, i.e., an analysis which focused upon the characterization of the sheriff as a "county" official rather than on the controlling question, i.e., whether the county or the state can "control" the sheriff with regard to the function at issue. Rather than focus on statutes which have anything to do with who actually controls the sheriffs, the Ninth Circuit erroneously focused on various statutes that appear to "label" a sheriff a "county" officer.[6] As this Court has cautioned in *McMillian*, however,

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[5] The plaintiff in *Peters*, like the plaintiffs in the instant case, was a former jail inmate who alleged that, after posting bail, she was overdetained for ten days and held on a warrant belonging to someone else. *Peters*, 68 Cal.App.4th at 1168. The County demurred to the plaintiff's section 1983 (*Monell*) cause of action arguing that, in operating the County jail, Sheriff Block acted as a state official rather than a policymaking County official, such that the County cannot be sued under section 1983. *Id.* The trial court overruled the demurrer and the County filed a petition for writ of mandate which, after briefing and oral argument, was granted.

[6] Significantly, a different three-judge panel of the Ninth Circuit in *Weiner v. San Diego County*, 210 F.3d 1025 (CA9 2000),

superficial appearances alone cannot justify imposing on the counties liability for every unconstitutional policy that the sheriff may choose to adopt. In other words, that sheriffs are frequently termed "county officers" does not alter the source of the authority they exercise.

Moreover, the Ninth Circuit improperly placed much stock on salary provisions. As the California Supreme Court in *Pitts* noted, the fact that a California county has the ability to set a salary for an employee "does not translate into *control* over him." *Pitts*, 17 Cal.4th at 355. In addition, the Ninth Circuit's erroneous conclusion that the Los Angeles County Board of Supervisors has control over the Sheriff's operation of the County jail (based on a misinterpretation of California Government Code §§ 25303 and 23013) contravenes relevant California authority. Indeed, Government Code § 25303 makes it abundantly clear that

> "[t]his section shall not be construed to affect the *independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff* and district attorney of a county. The board of supervisors *shall not obstruct the*

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analyzing provisions of California constitutional and statutory law, held in accord with the California Supreme Court in *Pitts*, i.e., a district attorney is a state official for purposes of section 1983 when engaged in the prosecutorial function.

Notably, the court in *Weiner* stated that the "fact that California statutory law list district attorneys as county officers is not dispositive because, as discussed in *McMillian*, the *function* of the district attorney, including who can control the district attorney's conduct is at issue." *Id.* at 1030 (emphasis added).

> *investigative function of the sheriff of the county. . . . "*

CAL. GOV'T CODE § 25303 (emphasis added). As California courts have made clear, "the board [of supervisors] not only ha[s] no duty but also *no right to control the operation of the jail." Brandt v. Bd. of Supervisors*, 84 Cal.App.3d 598, 602, 147 Cal.Rptr. 468, 471 (1978) (emphasis added); *see also, Dibb v. County of San Diego*, 8 Cal.4th 1200, 1209 n.4, 884 P.2d 1003, 1008, 36 Cal.Rptr.2d 55 (1994) (where the California Supreme Court recognized that the county board of supervisors is powerless to " 'direct the manner in which the [sheriff's] duties are performed.' ").

None of the criteria which the Ninth Circuit relied upon in support of its holding that the Sheriff exercises County authority alters the status of California sheriffs as constitutional officers of the state who, in enforcing state law, exercise state authority. Because the California appellate court in *Peters*, relying on the analysis and guidance provided by this Court in *McMillian* and the California Supreme Court in *Pitts*, has concluded that the Los Angeles County Sheriff acts as a State officer when formulating jail policies, the Ninth Circuit was bound to conclude the same. The Ninth Circuit's initial attempts to distinguish the facts of *Peters* from this instant case is superficial at best. Moreover, the Ninth Circuit's blatant refusal to follow a state appellate court's interpretation of state law by claiming "even if the case were on all fours we would not be bound by *Peters'* conclusion regarding section 1983 liability because such questions implicate federal, not state, law" (App. A544) contravenes the controlling principles repeatedly emphasized by this Court

in *McMillian, Jett,* and *Praprotnik* as well as principles of comity.

Application of the proper analysis by the Ninth Circuit would have yielded the same result as *Peters,* i.e., that only the state, not the counties through the boards of supervisors, have a right to control sheriffs with regard to law enforcement activities including operating the local jails.

B. Article V, § 13 Of The California Constitution And Government Code §§ 12560 And 12524 Clearly Establish That The Attorney General Is Vested With The Authority To Review And Control The Law Enforcement Activities Of The Sheriffs.

In considering which entity supervises the work of the district attorney, the California Supreme Court in *Pitts* noted that Article V, § 13 of the California Constitution places supervision of the State's several district attorneys with the Attorney General. *Pitts,* 17 Cal.4th at 356-57. Significantly, supervision of California sheriffs is also placed under the Attorney General by the *same* constitutional provision. Specifically, Article V, § 13 provides:

> "The Attorney General shall have direct supervision over every district attorney and **sheriff** and over such other law enforcement officers as may be designated by law, **in all matters pertaining to the duties of their respective offices,** and may require of any said officers to make reports concerning the investigation, detection, prosecution and **punishment of crime** in their

> respective jurisdictions as to the Attorney General may seem advisable."

CAL. CONST. ART. V, § 13. (Emphasis added).

Moreover, California district attorneys and sheriffs have been legislatively placed under the Attorney General's supervision by almost duplicate statutes. *See, Pitts*, 17 Cal.4th at 357-58, nn. 5 and 6; CAL. GOV'T CODE §§ 12550, 12560 and 12524. In fact, California Government Code § 12560 not only gives the Attorney General "direct supervision" over sheriffs wherein the Attorney General may require "reports concerning the investigation, detection and punishment of crime in their jurisdiction," but also empowers the Attorney General to "direct the activities of any sheriff relative to the investigation or detection of crime."[7] CAL. GOV'T CODE § 12560. Moreover, Government Code § 12524 authorizes the Attorney General to "call into conference the district attorneys **and sheriffs** of the several counties . . . for the purpose of discussing the duties of their respective offices, with the view of uniform and adequate enforcement of the laws of this state as contemplated by Section 13 of Article V of the Constitution of this state." CAL. GOV'T CODE § 12524. (Emphasis added). The Attorney General is also empowered to appoint a competent person to perform the duties of a sheriff, who will have all the power of a sheriff with respect to the matter for which he/she is appointed.

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[7] Notably, an almost identical provision under Alabama law was instrumental in influencing this Court's conclusion that Alabama sheriffs must be considered state officials. *McMillian, supra*, 520 U.S. at 791 (Alabama Attorney General empowered by statute to "direct the Sheriff to investigate 'any alleged violation of law in their counties' ").

See CAL. GOV'T CODE § 12561. In contrast, as emphasized by the *Pitts* court, California Government Code § 25303 specifically precludes any action by the county board of supervisors which "obstruct[s]" the sheriff's or district attorneys' performance of their duties, and that section "shall not be construed to affect the **independent and constitutionally and statutorily designated investigative and prosecutorial . . . functions of the sheriff and district attorney** of a county." *Pitts*, 17 Cal.4th at 358. (Emphasis added).

C. California Government Code § 26605 Vests The Sheriff With Exclusive Authority Over The County Jails While California Law Specifically Deny The County Board Of Supervisors The Right To Control The Operation Of The Jails.

By legislative mandate, the California sheriffs are required to "take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it. . . . " CAL. GOV'T CODE § 26605. In contrast, the county boards of supervisors have "no direct control" over the sheriffs in regard to the operation of the county jails. *See Peters*, 68 Cal.App.4th at 1177. As California courts have made abundantly clear, "the board not only ha[s] no duty but also **no right to control the operation of the jail**." *Brandt*, 84 Cal.App.3d at 602; *see also, Peters*, 68 Cal.App.4th at 1176. Moreover, while Government Code §§ 200, 201, 202 and 203 provide that the State (1) has the rights prescribed "over persons within its limits," (2) may "punish for crime;" (3) "may imprison or confine for protection of the public;" and (4) "may establish custody and restraint" of certain persons, respectively, " 'the

powers and duties of the counties themselves . . . do not include any provision in the area of law enforcement.' " *Pitts*, 17 Cal.4th at 359.[8]

Finally, California case law also dispels any argument that the limited responsibility that the Board of Supervisors has toward the County jails, that of providing funding for food, clothing,-bedding and other expenses (CAL. PENAL CODE § 4015) would be sufficient to hold the County liable under 42 U.S.C. § 1983 in this case. As the *Brandt* court noted, "[o]nly the sheriff has control of and responsibility for distribution and training of personnel **and the specific use of the funds allotted to him.**" *Brandt*, 84 Cal.App.3d at 602 (emphasis added).

Indeed, relying on *McMillian*, the Eleventh Circuit subsequently rejected a similar argument that a County Commission's funding of and inspection authority over the County jail means the Sheriff operates the jail as a county rather than state official.

> "The Alabama Code provides for the counties to remain informed about conditions within the

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[8] The Ninth Circuit misinterpreted Government Code § 25303 as giving boards of supervisors control over the sheriffs' operation of the county jails for the management of the individual county jails so long as the boards do not "obstruct the investigative functions of the sheriff of the county." That statute does not provide that the county *controls* the jail, but rather authorizes the county to transfer control of the county jail to a county created department of corrections. If the county already had control over the jail, as the Ninth Circuit concluded, this provision would be meaningless. Stated another way, the statute simply authorizes the county to assume control of the jail, something it did not have prior to the existence of that statutory authority.

> **jails. We conclude that the statutes are entirely consistent with the counties' limited role in building and funding the jails and do not imply or impart any control over the jails' operation."**

Turquitt v. Jefferson County, 137 F.3d 1285, 1290 (CA11 1998) (emphasis added). Moreover, even though Alabama law expressly empowers the County Commission "to inspect the jail without notice to the sheriff," the *Turquitt* court concluded this just represents "a reasonable way for the county to learn what its appropriations buy and whether future funding should be increased or redirected." *Id.*

D. Under Common Law, The California Sheriff Was Considered The Representative Of The Sovereign.

Lastly, it should not be overlooked that in *McMillian*, this Court also found significant the common law history of the sheriff as an officer or agent of the King, and the continuation of that common law tradition in the United States. *McMillian*, 520 U.S. at 793-95. In characterizing the plaintiff's argument as "simply a disagreement with the ancient understanding of what is meant to be a sheriff," this Court therefore evidenced its understanding that under common law, a sheriff is a state officer while carrying out his duty to keep the peace. *Id.* at 795. Significantly, the common law in England, insofar as it is not repugnant to or inconsistent with the laws of the state, is the rule of decision in all California courts. *See* CAL. CIVIL CODE § 22.2. There is therefore no reason to believe a

California sheriff has lost his common law character as the representative of the sovereign.

II. THE QUESTIONS PRESENTED ARE IMPORTANT TO THE PRINCIPLES OF STATE SOVEREIGNTY AND COMITY.

The Ninth Circuit's published decision raises serious concerns relating to principles of state sovereignty and comity. The Ninth Circuit's analysis would profoundly impact on state sovereignty, making the federal courts the final arbiter of who acts on behalf of the State of California. This opinion, therefore, is in direct conflict with *McMillian*'s proviso that "States have wide authority to set up their state and local governments as they wish." *McMillian*, 520 U.S. at 795. The attempt of the federal judiciary to inject itself into a state's decision-making process regarding whether an individual acts on its behalf should not be taken lightly. This is especially so where the California courts have held that sheriffs in California are state actors, not county actors, in setting county jail policies, and, particularly where the Legislature has not taken any contrary action in response to this interpretation. Under these circumstances, the federal judiciary should not be attempting to second-guess the State's legitimate governing process.

Not only does the Ninth Circuit's opinion completely disregard the states' sovereign choice in allocating governmental authority, but it also raises serious concerns relating to principles of comity. The objective of comity is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in state

courts, the other to be availed of in the federal courts. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken. *See generally, West*, 311 U.S. 223.

In *West*, this Court held that federal courts must follow the decisions of state courts regarding controlling state law. *Id.* at 236-37. In so holding, the Court stated:

> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances, a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

Id. (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817 (1938)).

In this particular case, the Ninth Circuit has analyzed virtually the same state statutes that the state appellate

court in *Peters* analyzed, but came to the opposite conclusion. The Ninth Circuit simply erred in imposing its own interpretation of California law in complete disregard of the state court's interpretation of its own laws. In doing so, the Ninth Circuit improperly interjected its own views of what the California law should be instead of what it is. *See Martinez v. Gomez*, 137 F.3d 1124, 1126 (CA9 1998) ("our role is to determine what the California law is, not what it should be. Whether [this case] should be overruled . . . is a matter we must leave to the California courts and California legislature.").

Moreover, the Ninth Circuit's cavalier disregard of state appellate precedent will not only result in lack of uniformity in the interpretation of state law, but it promises to pave way for forum shopping. Indeed, while state courts are bound by *Peters*,[9] the district courts in California assert that they are not bound to follow opinions of the appellate state courts. Until this conflict between the state and federal appellate courts in California is resolved, the forum in which a section 1983 claim is filed will likely determine whether or not a sheriff is deemed to be a state or county actor in a particular action. Uniformity of decisions for the federal and state appellate courts on the issue of whether California sheriffs act on behalf of the counties or on behalf of the State in setting policies relating to law enforcement activities for the purposes of *Monell* liability under section 1983 is therefore required to prevent forum shopping problems

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[9] *See Rohr Aircraft Corp. v. County of San Diego*, 51 Cal.2d 759, 764, 336 P.2d 521, 524 (1959) and *Garcia v. Superior Court*, 42 Cal.App.4th 177, 181, 49 Cal.Rptr.2d 580, 582 (1996).

throughout California and avoid inequitable administration of the laws.

Review is thus warranted so this Court can provide further guidance to federal and state appellate as well as trial courts on this important issue of law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: June 12, 2001

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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EDDIE SHIELDS, individually and as a class representative, *Plaintiff-Appellee,* v. COUNTY OF LOS ANGELES, a governmental entity; JERRY HARPER, Undersheriff; MICHAEL GRAHAM, Assistant Sheriff; BARRY KING, Chief; BOB PASH, Chief; DANIEL BURT, Commander, *Defendants-Appellants.*	No. 99-55898 D.C. No. CV-98-09695-WJR

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SHERMAN BLOCK, Sheriff, individually and in his Official Capacity,

Defendant,

and

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellant.

LEELLEN PATCHEN, individually and as class representative; STEVEN GRAY, individually and as class representative; ISAAC TCHAKMAKJIAN, individually and as class representative,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES, a governmental entity; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants-Appellants.

No. 99-56042

D.C. No. CV-98-09574-WJR

MICHAEL E. WHITE; APRIL MARIE COURIE; ERIC MITCHELL; DIANE RAMIREZ, individually and as class representative; HEATHER YOUSIF, individually and as class representative; MARGO V. BORRUP, individually and as class representative; QUINTON COOPER; RUBY SELLARS; LEELLEN PATCHEN, individually and as class representative; STEVEN GRAY, individually and as class representative; ISAAC TCHAKMAKJIAN, individually and as class representative; EDDIE SHIELDS, individually and as class representative; DIEGO SANTILLANA, individually and as class representative; MICHAEL ROERICH, individually; RANDALL CLEAVES, individually and as class representative,

Plaintiffs-Appellees,

v.

SHERMAN NMI BLOCK, Sheriff, individually and in his official capacity,

Defendant,

and

COUNTY OF LOS ANGELES, a governmental entity; LOS ANGELES COUNTY SHERIFF DEPARTMENT, as Doe 1,

Defendants-Appellants.

No. 99-56233

D.C. No. CV-97-03826-WJR

SAMUEL GLADNEY, *Plaintiff-Appellee,* v. COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; ESTATE OF SHERMAN BLOCK; JERRY HARPER; MICHAEL GRAHAM; ROBERT MANN; BARRY KING; DANIEL BURT, *Defendants-Appellants.*	No. 99-56310 D.C. No. CV-99-00586-WJR
MUNIQUE WILLIAMS; MICHAEL E. WHITE; APRIL MARIE COURIE; ERIC MITCHELL; DIANE RAMIREZ, individually, and as class representative; MARGO V. BORRUP, individually, and as class representative; QUINTON COOPER; RUBY SELLARS, *Plaintiffs-Appellees,* and JOHNNY RAY TOLBERT; KEVIN BAXTER, individually and as class representatives and in their capacities as taxpayers; JOSEPH WHITNER, individually, and as class representative; YOLANDA CORBERT, individually, and as class representative; CASSONDRA MCNAIR, individually, and as class representative; RONALD J. BORRUP, individually, and as class	No. 99-56766 D.C. No CV-97-03826-WJR OPINION

representative; KIRK DOUGLAS; JULIAN VALDEZ; FRANK LOPEZ; JOE SANCHEZ, JR.; MOISES CARRANZA; HAMID SHAHIAN; HERMAN WYCHE; DUC HUU PHAM; REGINA LANELL REED; ROY LEE WIMBERLY; GREGORY WHITE; EDWARD ALLEN PALMER,

Plaintiffs,

v.

SHERMAN BLOCK, individually and in his official capacity; JERRY HARPER, Undersheriff; MICHAEL GRAHAM, Assistant Sheriff; BARRY KING, Chief; DOES 1 THROUGH 1000, individually and in their official capacities,

Defendants,

and

COUNTY OF LOS ANGELES, a governmental entity,

Defendant-Appellant.

Appeals from the United States District Court
for the Central District of California;
William J. Rea, District Judge, Presiding.

Argued and Submitted
February 10, 2000 – Pasadena, California

Filed January 12, 2001

Before: Harry Pregerson, Warren J. Ferguson, and
Kim McLane Wardlaw, Circuit Judges.

COUNSEL

David D. Lawrence, Scott D. MacLatchie, and Chandra Gehri Spencer, Franscell, Strickland, Roberts, & Lawrence, Pasadena, California, for the defendants-appellants.

John Burton, Law Offices of John Burton, Pasadena, California; Barrett S. Litt, Litt & Associates, Los Angeles, California, for the plaintiffs-appellees.

OPINION

WARDLAW, Circuit Judge:

Does the Los Angeles County Sheriff's Department (the "LASD") in adopting and administering its policy of requiring that a records check, including review of all wants and holds received on a prisoner's release date, act on behalf of the state of California or on behalf of the County of Los Angeles (the "County")? The answer to this question determines whether the County may be subject to liability under 42 U.S.C. § 1983 and *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Because we conclude that the LASD, when implementing its policy of conducting prisoner release records checks, acts for the County in its capacity as the administrator of the Los Angeles County jails, we hold that both the LASD and the County are subject to liability under section 1983. We also reject the LASD's contention that it is an "arm of the state," reiterating our determination that it is subject to liability under section 1983. We also conclude that the

LASD is a "public entity" that is separately suable in federal court. We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(b), and we affirm.

I. BACKGROUND

Appellees brought suit against the County, its late Sheriff, Sherman Block, the LASD, and various LASD officials responsible for the management and operation of the Los Angeles County jails. The appellees allege that they were detained in county jails after all legal justification for their seizure and detention ended, in violation of both federal and state law.

Before an inmate is released from prison, the LASD conducts a check of the Automated Justice Information System ("AJIS"), a computerized law enforcement database, to confirm that the prisoner is not wanted by any other law enforcement agency. It is the LASD's policy, however, to run the AJIS check only after all wants and holds that arrive on the day a prisoner is scheduled for release are inputted into the database. Due to the high volume of wants and holds received each day, the inputting process can, and often does, take between one to two days to complete. It is only after the inputting process is complete and the computer check run, that the LASD begins the administrative steps toward a prisoner's release. Although no longer required to serve time, these prisoners must remain in jail during the inputting period, extending their incarceration beyond their release date.[1]

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[1] For an in-depth discussion of the LASD's procedure, see *Fowler v. Block*, 2 F.Supp.2d 1268, 1277-79 (C.D. Cal. 1998), *rev'd*,

Appellees seek monetary damages for overdetention in each of these six separately filed actions.[2] The County and LASD moved to dismiss the appellees' suits. In all of the district court actions but one, the County moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the section 1983 claims brought against it.[3] In the other district court action, the County moved for summary

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185 F.3d 866 (9th Cir. 1999). In *Fowler*, the district court found that "in the face of [a] state court's 'clearly established' release order, it was unreasonable for the [Sheriff] to do more than simply 'check-out' the Plaintiff after he was returned to custody." *Id.* at 1279. Accordingly, the district court found that AJIS checks conducted after a prisoner's release and resulting in overdetention were impermissible and the sheriffs were not entitled to qualified immunity. *Id.* We subsequently reversed and remanded this case on procedural grounds, and did not reach the constitutional issues.

In at least one other district court case, a preliminary injunction was issued ordering the LASD to desist in delaying a prisoner's release upon the completion of his or her sentence. *See Vanke v. Block*, No. 98-4111 (C.D. Cal. Nov. 7, 1998). In *Vanke*, the district court found that the delays in the AJIS checks process deprived the detainees of their Fourth and Fifth Amendment rights.

[2] One additional appeal was heard on a related matter in *Williams v. Block, et al.*, No. 98-55609. The plaintiff, Williams, appealed the district court's denial of her motion for class certification. We reversed and remanded the case to the district court, but since our ruling, the parties have stipulated to dismiss the case.

[3] The County moved for dismissal in the *Cleaves, et al. v. County of Los Angeles, et al.*, No. CV-98-09573-WJR; *Gladney v. County of Los Angeles, et al.*, No. CV-99-00586-WJR; *Patchen, et al. v. County of Los Angeles, et al.*, No. CV-98-09574-WJR; *Shields v. County of Los Angeles, et al.*, No. CV-98-09695-WJR; and *Streit, et al. v. County of Los Angeles, et al.*, No. CV-98-09575-WJR.

judgment on the appellees' section 1983 claims.[4] The LASD moved under Rule 12(b)(6) to dismiss all six actions in one consolidated motion.

Relying on *McMillian v. Monroe County*, 520 U.S. 781 (1997), and the California Court of Appeal decision in *County of Los Angeles v. Superior Court (Peters)*, 80 Cal. Rptr. 2d 860 (Ct. App. 1998), the County argued that because the Sheriff of Los Angeles (the "Sheriff") functions as a state – not county – official engaged in a law enforcement function, the County cannot be sued under 42 U.S.C. § 1983 for the alleged constitutional torts of the Sheriff or his deputies. The LASD similarly contended that because it is an "arm of the state,"[5] the LASD is not within the section 1983 definition of "person," and therefore it could not be held liable. The LASD also urged dismissal on the grounds that it is not a separately suable public entity under California Government Code § 811.2.

The district court rejected each of these arguments and denied the LASD's motion to dismiss all claims. It denied in part, and granted in part, the County's five motions for dismissal in a series of roughly identical

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[4] The County moved for summary judgment in *Williams, et al. v. Block, et al.*, No. CV-97-03826-WJR.

[5] *See Durning v. Citibank*, 950 F.2d 1419, 1423-24 (9th Cir. 1991). In *Durning*, we explained that "[u]nder the 'arm of the state' doctrine, a state agent or agency is immune from suit under the Eleventh Amendment because the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials [or state institutions] are nominal defendants." *Id.* (citations omitted).

orders.[6] In its joint-tentative ruling denying the County's motions to dismiss and the LASD consolidated motion to dismiss, the district court distinguished *Peters*, which broadly held that "in setting policies concerning the release of persons from the Los Angeles County jail, the Los Angeles County Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the County of Los Angeles." *Peters*, 80 Cal. Rptr. 2d at 868. The court noted that the law enforcement function involved in *Peters* was "determining whether to release a person who may be subject to arrest on an outstanding warrant." It found that, here, "the overdetention had nothing to do with the sheriff's law enforcement function [because,] [i]n contrast to *Peters*, there is no dispute that Plaintiffs were entitled to be released." Rather, "the sheriff's conduct at issue relates to a purely administrative function," and "where the Sheriff acts in a purely administrative manner such action is pursuant to their [sic] county, not state, authority." Thus, the district court held that the LASD was subject to 1983 liability for these actions.

The district court also addressed the LASD's claim that it was not a separately suable entity. Relying on our decisions in *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir. 1988), and *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 604-05 (9th Cir. 1986), the district court ruled that the LASD is a

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[6] The district court granted the County's motions, in part, dismissing the various plaintiffs' Fourteenth Amendment claims in each action. In the sixth case, *Gladney*, the district court reserved ruling pending arguments on several other motions.

separately suable entity. It also rejected the LASD's argument that "the amendment of Cal. Evid. Code § 669.1 in some way modified the definition of a 'public entity.' " The court reasoned, "§ 669.1 is only intended to be an evidentiary limitation for cases involving public employees, and is not intended to redefine a 'public entity.' "

Relying on these same reasons recited in its second tentative ruling, the district court denied in part, and granted in part, the County's motion for summary judgment dismissal of the section 1983 claims in the one action in which it did not file a motion to dismiss.[7] The district court also used this tentative ruling to deny the County's remaining motion to dismiss. Specifically, the district court found that "the sheriffs were not state actors, but they were acting on behalf of the County in the instant cases." Therefore, it concluded that the County was answerable under section 1983 for the challenged overdetentions.

On May 25, 1999, the district court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) all but one of its orders denying the County's and the LASD's motions to dismiss.[8] On July 26, 1999, we granted the

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[7] The district court also ruled upon the County's arguments regarding proximate cause, negligence, Thirteenth Amendment claims, and the application of the Prison Litigation Reform Act. These issues are not before us on this appeal.

[8] Because the district court had reserved its ruling in *Gladney*, the sixth and final action, pending the outcome of other motions, the case was not eligible for certification as part of the consolidated interlocutory appeal.

County and the LASD permission to appeal these certified interlocutory orders. The County and the LASD also timely filed notices of appeal in each of these cases and those not certified on interlocutory appeal on the basis that the district court's orders are immediately appealable under the collateral order doctrine.

II. JURISDICTION

Because we have granted the County and the LASD permission to appeal those orders that the district court certified for interlocutory appeal, we have jurisdiction under 28 U.S.C. § 1292(b) to review any issue fairly included within the certified orders. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996) ("As the text of § 1292 indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court."). Thus, we have jurisdiction pursuant to 28 U.S.C. § 1292(b) to review appeals Nos. 99-55897, 99-55898, 99-55899, 99-56041, and 99-56233.[9]

Section 1292(b), however, does not provide the jurisdictional basis for our review of all the appeals now before us. Appeal No. 99-56310 (the County's and the LASD's appeals from the district court's denials of their motions to dismiss in *Gladney v. County of Los Angeles, et al.*, No. CV-99-00586-WJR) and No. 99-56766 (the

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[9] Appeal No. 99-56233, *White, et al., v. Block, et al.*, is the County and LASD's consolidated interlocutory appeal itself. Although the cases are listed individually as well, the interlocutory appeal is included separately to indicate its certification for our review.

County's appeal from the district court's denial of its motion for summary judgment in *Williams v. Block, et al.*, No. CV-97-3826-WJR) have been neither certified by the district court nor approved for interlocutory appeal by this court. Nevertheless, we conclude that we have jurisdiction over these appeals under the collateral order doctrine and the doctrine of pendent appellate jurisdiction.

In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court established the collateral order doctrine, holding that a district court order that "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment" is appealable as "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.* at 544-45. In subsequent cases, the Court has upheld a circuit court's use of the collateral order doctrine to entertain jurisdiction over appeals from the denial of a summary judgment motion that raised a qualified immunity defense. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993) (holding "that orders denying individual officials' claims of absolute and qualified immunity are among those that fall within the ambit of *Cohen*"); *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (finding that "[t]he denial of a defendant's motion for dismissal or summary judgment on the grounds of qualified immunity easily meets [the] requirements [of a collateral order]"); *id.* at 530 ("[A] district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."). By direct application of this doctrine, we

have jurisdiction in appeal No. 99-56310, regarding the LASD's appeal of the district court's order holding it potentially liable as a County actor and not immune from suit in federal court under Federal Rule of Civil Procedure 17(b).

We also conclude that we have jurisdiction over all aspects of appeal No. 99-56310 and No. 99-56766 under the doctrine of pendent appellate jurisdiction. In *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), the Supreme Court suggested that district court decisions that are "inextricably intertwined" may be appropriate for joint review under the doctrine of pendent party appellate jurisdiction. *Id.* at 50-51. Acting in accordance with *Swint*, a panel of this court in *Huskey v. City of San Jose*, 204 F.3d 893, 904-05 (9th Cir. 2000), recently applied pendent appellate jurisdiction to review two orders denying summary judgment with jurisdictional facts similar to those present here. In *Huskey*, a former deputy city attorney sued the City of San Jose and the individual heads of the City Attorney's office under 42 U.S.C. § 1983, seeking damages for wrongful termination and various other torts. The district court denied the City of San Jose and individual defendants' motions for summary judgment, which claimed a qualified immunity defense. The individuals appealed the denial of summary judgment and we granted review. *Id.* at 898-902. We further found that the order denying the City of San Jose's claim to summary judgment was inextricably intertwined with an order denying the individual's summary judgment motion and therefore employed pendent jurisdiction to hear the City's appeal. *Id.* at 902-06. The same procedural and jurisdictional situation exists here.

Accordingly, because the district court's orders denying the motions to dismiss in appeal No. 99-56310 and denying the motion for summary judgment in appeal No. 99-56766 raise the same issues, use the same legal reasoning, and reach the same conclusions as the earlier orders over which we have jurisdiction under section 1292(b), we find that appeals Nos. 99 56310 and 99-56766 are "inextricably intertwined" with the earlier orders. It is therefore proper exercise of our pendent appellate jurisdiction to review these appeals.

Having determined that we have jurisdiction, we turn now to a de novo review of the merits of the County's and the LASD's appeals.

III. DISCUSSION

A. *County Liability*

The question of the County's liability for the alleged constitutional torts of the LASD is governed by the analytical framework set out in *McMillian v. Monroe County*, 520 U.S. 781 (1997). In *McMillian*, Alabama's Monroe County, like the County here, was sued for allegedly unconstitutional actions undertaken by the Monroe County Sheriff. A county is subject to section 1983 liability for such suits if its policies, whether set by the government's lawmakers "or by those whose edicts or acts that may fairly be said to represent official policy," caused the particular constitutional violation at issue. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Here, as in *McMillian*, the parties agree that the Sheriff is the policymaker whose actions are to be examined; they "sharply disagree" about whether the

Sheriff is a policymaker on behalf of the State, in which case no section 1983 action lies because the Sheriff would not be a "person" within the meaning of the statute, or on behalf of the County.

The Supreme Court in *McMillian* offered two principles which guide us in resolving this question. First, it cautioned against employing a "categorical, all or nothing" approach. *Id.* at 785. Rather, we are to inquire "whether governmental officials are final policymakers for the local government in a particular area or on a particular issue." *Id.* Second, although the question of municipal liability under section 1983 is one of federal law, "our inquiry is dependent on an analysis of state law." *Id.* at 786. That is, "our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law." *Id.* at 786.

The appellants erroneously urge that *only* state law controls this appeal. In particular, the appellants rely almost exclusively on *County of Los Angeles v. Superior Court (Peters)*, 80 Cal. Rptr. 2d 860 (Ct. App. 1998), as the controlling authority.[10] Although we must consider the state's legal characterization of the government entities which are parties to these actions, federal law provides the rule of decision in section 1983 actions. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 n.5 (1997) (finding that "the question whether a particular state agency has the same kind of independent status as a

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[10] As will be discussed below, we note here that *Peters* is factually distinguishable from the cases before us and therefore would not "control" our decision in any event.

county . . . is a question of federal law . . . [b]ut that federal question can be answered only after considering the provisions of state law that define the agency's character."); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (noting that "the identification of policymaking officials is a question of state law"). And, although it may be instructive on questions of liability in certain specific contexts, state law does not control our interpretation of a federal statute. To trigger section 1983 liability, plaintiffs must claim that their "rights, privileges, or immunities secured by the Constitution and [federal] laws" have been violated under the color of state law or action. 42 U.S.C. § 1983. "The elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, 496 U.S. 356, 375 (1990). Therefore, federal courts have generally recognized the primary importance of federal law in section 1983 litigation. *See Howlett*, 496 U.S. at 376; *Monell*, 436 U.S. 658; *Tiemann v. Tul-Center, Inc.*, 18 F.3d 851 (10th Cir. 1994); *Larez v. Holcomb*, 16 F.3d 1513, 1520 (9th Cir. 1994). Recognizing the appropriate deference to state law in the context of section 1983, the *McMillian* Court closely examined the Alabama Constitution, Code and case law, finding critical to its decision that the Alabama Supreme Court had interpreted various of the relevant provisions and their historical background as evidence of " 'the framer's intent to ensure that sheriffs be considered executive officials of the state.' " *Id.* at 789 (citations omitted). After its detailed analysis of Alabama's governmental structure and allocation of powers and duties among its institutions, the Court concluded that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their

counties." *Id.* at 793. The Court, however, rejected a "uniform, national characterization of all sheriffs," because "such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish." *Id.* at 795. Justice Ginsburg, in dissent, nevertheless emphasized the limited scope of *McMillian*'s holding through its "Alabama-specific approach" and its admonition to examine the particular function at issue in a given case. *Id.* at 804 (Ginsburg, J. dissenting). As Justice Ginsburg noted, the majority opinion did not question that a sheriff might be a county policymaker for some purposes and in some states. *Id.*

In the cases before us, the district court found that the function in question was the effectuation of the release of persons where it is clear that there is no legal cause for their continued detention; and that in that function, the LASD acts pursuant to county, not state authority. The function as described by the district court may be overly narrow. However, even if we view the function more broadly as the oversight and management of the local jail, we are compelled to agree with the district court that the Sheriff acts for the County in this management function. This conclusion is based on our own independent analysis of California's constitution, statutes, and case law. *Weiner v. San Diego County*, 210 F.3d 1025, 1029 (9th Cir. 2000) (noting that a reviewing court must "examine California's constitution, statutes, and case law" when determining a county's liability under *McMillian*).

Unlike the Alabama Constitution,[11] the California Constitution does not list sheriffs as part of "the state 'executive department.' " *McMillian*, 520 U.S. at 787 (finding this designation "especially important" for determining liability). Instead, Article XI, section 1(b) of the California Constitution designates sheriffs as county officers. Cal. Const. art. XI, § 1(b) ("The Legislature shall provide for . . . an elected county sheriff. . . . "); *see also DeGenova*, 209 F.3d 973, 976 (7th Cir. 2000) (noting that the Illinois Constitution's designation of sheriffs as county officers "strongly indicates that the Sheriff is an agent for the county, and not the State"). Indeed, "[n]ot only does the California Constitution lack the provisions most important to the Supreme Court's decision in *McMillian*, its provisions read much like those of the Alabama Constitution prior to that State's determined effort to clarify that sheriffs were acting for the State when exercising their law enforcement functions." *Roe v. County of Lake*, 107 F.Supp.2d 1146, 1149 (N.D. Cal. 2000); *see McMillian*, 520 U.S. at 788. Thus, under the California Constitution, the LASD is generally a county, not state, agency. Even more critical to our analysis, there is no provision in the

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[11] Historically, Alabama county sheriffs were squarely placed under state control to stop them from assisting lynch mobs in killing black prisoners. *McMillian*, 520 U.S. at 788. No such history has forced California to take control of its county sheriffs through its state constitution. In fact, quite the opposite has been true in California. In 1970, the California legislature deleted constitutional provisions that gave it the authority to define the sheriffs' duties, devolving control from the state to the counties. *See Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 796 (Cal. 1988).

California Constitution that states that the LASD acts for the state when managing the local jails.

The California Government Code also supports the conclusion that the LASD operates for the County when administering local prison policy. Although the California Attorney General, like the Alabama Attorney General in *McMillian*, has statutory control over the sheriffs in a law enforcement capacity, in California, the counties hold the ultimate power over the jails. *Compare* Cal. Gov. Code § 12560 (granting the Attorney General power over the sheriffs' activities relevant to the "investigation or detection of crime"), *with* Cal. Gov. Code § 25303 (granting the county boards of supervisors broad fiscal and administrative powers for the management of the individual county jails so long as the boards do not "obstruct the investigative function of the sheriff of the county"). The counties retain the power to transfer control of a county jail from the sheriff to a county-created department of corrections, suggesting that the counties actually control and operate the jails, and not the state via the sheriffs. Cal. Gov. Code § 23013; *Beck v. County of Santa Clara*, 204 Cal. App. 3d 789, 793 (1988). We find that sections 23013 and 25303 weigh heavily in favor of our conclusion that the LASD's jail-release policies are a county function and a county concern. *See Dotson v. Chester*, 937 F.2d 920, 928 (4th Cir. 1991) (interpreting a Maryland statute virtually identical to section 23013 and concluding that because "state statutes confer authority on the counties to transfer control of the jail from the sheriff to a county warden," it has "no doubt but that sheriffs are final policymakers *for counties* when operating jails" (emphasis added)). Thus, under these state statutes, the County, not the state, oversees the

local jails, and the LASD, as the administrator of those jails, acts for the County.

Other provisions in the California Government Code further support the County's liability for the LASD's actions. Under California law, monetary damages for section 1983 claims are paid by the County and not the state. Cal. Gov. Code § 815.2. This crucial factor weighs heavily toward finding that, in the cases at hand, the LASD functions as a county, rather than a state, agency. *See McMillian*, 520 U.S. at 789 (stating that it was "critical[ ] for our case" and "strong evidence in favor of the . . . conclusion that sheriffs act on behalf of the State" that a judgment against the sheriff would be a suit against the state, and that the county would not be liable for a sheriff's acts under respondeat superior). In California, sheriffs are elected county officers. *See* Cal. Gov. Code § 24000(b) (providing that a sheriff be included as one of the county officers); Cal. Elec. Code § 314 (defining a "county officer" as "any elected officer enumerated in . . . Section 24000 . . . of the Government Code."). Sheriffs are required to have their offices at the county seat with the other county officers, Cal. Gov. Code § 24250; their vacancies are filled as "provided by law for filling elective county offices;"[12] Cal. Gov. Code § 24205; and their services are contracted out by the counties – not the state. *See* Cal. Gov. Code § 53069.8; *see also* County of Los Angeles Charter §§ 56, 56, 56. These various state

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[12] In the County of Los Angeles, the Los Angeles County Board of Supervisors appoints an interim sheriff to hold office until the next countywide election. County of Los Angeles Charter § 16.

provisions lead inexorably to the conclusion that the LASD is tied to the County in its political, administrative, and fiscal capacities. Therefore, the County appears subject to liability for the LASD's actions.

Even the Los Angeles County Code supports the conclusion that the LASD's connection to the County subjects the County to potential liability. The LASD is an agency established and governed by the Los Angeles County Code. *See* Los Angeles County Code, ch. 2.34. The Los Angeles County Sheriff is an elected position that is established by the Los Angeles County Charter. *See* Los Angeles County Charter, art. IV, sec. 12. The Los Angeles County Board of Supervisors retains budgetary oversight and control over the LASD. *See* Los Angeles County Code, subch. 4.12.030. Like all other county agencies, the LASD submits budget requests to the LASD each fiscal year. *See* Los Angeles County Code, subch. 4.12.070. Whether under state or local law, the County appears liable for the LASD's actions.

Finally, in reviewing the relevant case law, we find equally compelling evidence to hold the County liable for the LASD's conduct in administering the AJIS checks. Of particular importance to our analysis is *Sullivan v. County of Los Angeles*, 12 Cal.3d 710, 717 (1974). In *Sullivan*, the California Supreme Court held that the County was liable for the Sheriff's failure to release a prisoner who had served a completed sentence. Jack Sullivan was to be released from a 50-day drunk driving sentence after a Los Angeles Superior Court issued an order dismissing the charges against Sullivan. *Id.* at 714. Because the Superior Court neglected to file an order for his release, Sullivan remained in jail and served his full sentence. *Id.* Due to

the administrative error relating to the previously unfiled release order, no order was issued to release Sullivan upon completion of his full sentence either. *Id.* Sullivan was finally released twelve days after his sentence ended and nearly a month after his early release date. *Id.* at 715. The California Supreme Court held that the Sheriff's failure to release Sullivan resulted in his false imprisonment, and therefore held the County liable for damages. *Id.* at 716-17. The *Sullivan* court reasoned that "when the jail term has expired; in the eyes of the law [the] plaintiff is no longer a 'prisoner.' " *Id.* at 717. This holding is applicable to the cases at hand.

Other cases further support holding the County responsible under section 1983 for the LASD's actions. In *Beck v. County of Santa Clara,* 204 Cal.App.3d 789 (Ct. App. 1988), the California Court of Appeals upheld the County of Santa Clara's exercise of authority over its local jails, when it chose to transfer the management of the jails from the county sheriff to a newly created County Department of Detention. *Id.* at 792-93. The Court of Appeals found that although sheriffs derive their powers from the state in part, the control over the local prisons is within the authority of the individual counties. *Id.* at 795-805. A recent case from the Northern District of California, *Roe v. County of Lake,* 107 F.Supp.2d 1146 (N.D. Cal. 2000), is also instructive. In a well-reasoned opinion analyzing *McMillian*'s application to a section 1983 action against a local county sheriff and the county in which he was elected, the district court found that in the setting of policies and administration of his office, the sheriff was the County's chief policymaker. We agree with the district court's reasoning that:

> Recognizing that local police power is derived from the State, *McMillian* requires a court to analyze the delegation of that power to determine whether it was sufficiently complete such that a suit for abuse of that power is not a suit against the State. It seems clear . . . that California's delegation of authority to [the] Sheriff [here] is sufficiently complete. It is difficult to see how a judgment against a sheriff who, as is alleged here, permits his office to violate the civil rights of women in the way he maintains his staff and sets his policies, will operate as a judgment against the state.

Id. at 1151 (citations omitted).

The County does not counter with any arguments predicated on an analysis of the California Constitution, codes, or regulations; nor does it urge upon us contrary provisions in its charter or regulations. Rather than conducting an independent analysis of California law, the County urges us simply to adopt the holding of *County of Los Angeles v. Superior Court (Peters)*, 80 Cal. Rptr. 2d 860 (Ct. App. 1998), in which the California Court of Appeal found that the LASD was a state actor and therefore immune from liability under 42 U.S.C. 1983. Peters sued the LASD and the County because the LASD held her for ten days after she had posted bail. The LASD overdetained Peters based on a facially-valid outstanding arrest warrant that was subsequently found to have been issued for another person. Peters claimed the LASD reasonably should have known the warrant did not apply to her and sought damages under section 1983.

The California Court of Appeal concluded that "in setting the policies governing the release of prisoners

from the Los Angeles County jail, the Los Angeles County Sheriff acts as a state official rather than a policymaking official for the County of Los Angeles." *Id.* at 861 (citing *Pitts v. County of Kern*, 17 Cal.4th 340 (1998)).[13] Relying on *Pitts* and *McMillian*, the *Peters* court examined the relevant sections of the California Government Code and state case law in reaching its conclusion. The County argues that *Peters* is analogous to the cases on appeal and therefore controls our analysis. We disagree.

Although the general issue of overdetention was presented in both *Peters* and the cases at hand, the factual scenarios are quite distinct. In *Peters*, the LASD acted upon a facially-valid warrant in its detention of the plaintiff, where as here, in conducting AJIS checks, the LASD is conducting its own administrative search for outstanding warrants, wants, or holds upon which it would be required to act, if they existed. Although this distinction

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[13] In *Pitts*, the California Supreme Court applied *McMillian* to determine "whether for the purposes of local government damages liability, a California district attorney acts on behalf of the state or the county when preparing to prosecute and while prosecuting criminal violations of state law, and when establishing policy and training employees in these areas." *Pitts*, 17 Cal.4th at 345. The *Pitts* court held that "a district attorney acts on behalf of the state when training personnel for and developing policy regarding the preparation for prosecution and prosecution of criminal violations of state law," and therefore found the district attorney was not a suable person under section 1983. *Id.* at 366. Although *Pitts* provides some insight into California's application of *McMillian*, we note that the differences between the duties and activities of district attorneys and sheriffs are too great to allow *Pitts* to influence our decision in the cases on appeal, especially in light of the requisite case-by-case analysis demanded by *McMillian*.

may be perceived as subtle, for purposes of our analysis, it is critical. Acting upon a warrant is a law enforcement function with which the LASD is tasked under California state law. *See* Cal. Gov. Code § 12560. Searching for wants and holds that may or may not have been issued for persons whom the state has no legal right to detain is an administrative function of jail operations for which the LASD answers to the County. *See* Cal. Gov. Code §§ 25303, 26605. Whether or not the policy and practice of detaining persons beyond their term of incarceration for this administrative function violates the Constitution will be a question for the trial court.

Moreover, even if the case were on all fours we would not be bound by *Peters*'s conclusion regarding section 1983 liability because such questions implicate federal, not state, law. *See Owen v. City of Independence*, 445 U.S. 622, 647 n.30 (1980); *Weiner*, 210 F.3d at 1029. Although we have never before addressed the question we resolve today, we note that our holding comports with the many cases in which we have assumed California sheriffs to be county policymakers for section 1983 purposes.[14]

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[14] Again, in *County of Lake*, the district court exhaustively compiled a list of cases in which "the Ninth Circuit has considered a California sheriff a local law enforcement agent for purposes of establishing section 1983 liability under *Monell*." *County of Lake*, 107 F.Supp.2d at 1148; *see Id.* at 1148 n.4. They include cases holding California sheriffs liable as local agents decided both before and after *McMillian*. *See, e.g., Headwaters Forest Def. v. County of Humboldt*, 211 F.3d 1121, 1126 n.2 (9th Cir. 2000); *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000); *Henry v. County of Shasta*, 132 F.3d 512, 517-23 (9th Cir. 1997); *Navarro v. Block*, 72 F.3d 712, 714-15 (9th Cir. 1995);

Under *Monell*, the County would be liable for section 1983 damages "[i]f the sheriff's actions constitute county 'policy.' " *McMillian*, 520 U.S. at 783 (citing *Monell*, 436 U.S. at 694). Upon examining the precise function at issue in conjunction with the state constitution, codes, and case law, we conclude that the LASD acts as the final policy-maker for the county when administering the County's release policy and not in its state law enforcement capacity. We therefore affirm the district court's holding that the LASD, when functioning as the administrator of the local jail, is a County actor, and that the County may therefore be subject to liability under 42 U.S.C. § 1983.

B. *LASD Liability*

1. *Suable Entity*

The LASD also argues that it is not separately suable in federal court under Federal Rule of Civil Procedure 17(b). In support of its argument, the LASD cites *Garcia v. County of Los Angeles*, 588 F.Supp. 700 (C.D. Cal. 1984), in which the LASD was found to be a non-separately suable entity. In the cases at hand, the district court recognized that in a more recent opinion, *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 605 (9th Cir. 1986), we found a police department to be a separately suable entity and therefore declined to apply *Garcia* in favor of *Shaw*. As we pointed out in *Shaw*,

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Hallstrom v. City of Garden City, 991 F.2d 1473, 1481-82 (9th Cir. 1993); *Redman v. County of San Diego*, 942 F.2d 1435, 1447 (9th Cir. 1991); *Merritt v. County of Los Angeles*, 875 F.2d 765, 770-71 (9th Cir. 1989).

> Under Rule 17(b) of the Federal Rules of Civil Procedure, the Police Department's capacity to be sued in federal court is to be determined by the law of California. Section 945 of the California Government Code provides that "[a] public entity may sue or be sued." Section 811.2 of the Government Code defines a "public entity to include 'the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or political corporation in the State.' "

Id. at 604.

Relying on California court decisions that "held that a police department is a public entity under section 200 of the California Evidence Code," we then concluded that "the courts of California would hold that the Police Department is a public entity under section 811.2." *Shaw*, at 604; *see also Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir. 1988) ("Municipal police departments are 'public entities' under California law and, hence, can be sued in federal court for alleged civil rights violations."). Thus, under Rule 17(b) a Police Department may be sued in Federal Court. *Shaw*, at 605.

Although the appeals before us, unlike *Shaw* and *Karim-Panahi*, confront the suability of a *sheriff's* department rather than a *police* department, the LASD does not contend that *Shaw* and *Karim-Panahi* are distinguishable on this ground, and we see no basis for such a distinction. Indeed, in reaching our decision in *Shaw*, we rejected the holding of *Garcia*, in which "the district court held that the Los Angeles County Sheriff's Department was not a 'public entity' under § 811.2." *Shaw*, 788 F.2d at 604; *see*

also Jackson v. Alameda County Sheriff's Dep't, No. C-92-4419-BAC, 1993 WL 174896, at *4 (N.D. Cal. May 14, 1993) (reading *Shaw* to hold that sheriff's departments are separately suable public entities under California law).

The LASD also argues that *Shaw* was subsequently undermined by a change in the California Evidence Code provision on which it relied. However, our decision in *Karim-Panahi*, a progeny of *Shaw*, was rendered after the Evidence Code section to which the LASD points, section 669.1, was added. *See* Cal. Evid. Code § 669.1 historical and statutory notes (West 1995). Therefore, even if the LASD's argument were availing, *Karim-Panahi* would nevertheless control our decision. *See Visness v. Contra Costa County (In re Visness)*, 57 F.3d 775, 778 (9th Cir. 1995) (stating that to the extent a prior panel's decision "rests on state law, a *change* in California statutory and common law . . . would permit" a subsequent panel "to reconsider the issues decided by" the prior panel (emphasis added)); *Jones-Hamilton v. Beazer Materials & Servs.*, 973 F.2d 688, 696 n.4 (9th Cir. 1992) (noting that a prior panel's "interpretation of California law is 'binding in the absence of any *subsequent* indication from the California courts that our interpretation was incorrect' " (emphasis added) (quoting *Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983)).

Moreover, section 669.1 does not purport to alter the meaning of "public entity," to have any impact on the Evidence Code section on which the *Shaw* Court actually relied (section 200), or to affect section 811.2 of the Government Code. *See* Cal. Evid. Code § 669.1. Thus, even if we were to entertain the LASD's argument, we would reject it. The California legislature's enactment of section

669.1 "does not provide the kind of indication that our past interpretation of California law was incorrect that would cause us to revisit our holding in [*Shaw*]." *Jones-Hamilton*, 973 F.2d at 696 n.4.

Accordingly, we agree with the district court and conclude that under *Shaw* and *Karim-Panahi*, the LASD is a separately suable entity.

2. *Arm of the State Doctrine*

The LASD further argues that even if we find that it is a separately suable entity, it is entitled to Eleventh Amendment immunity under the "arm of the state" doctrine. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989). Agencies of the state are generally immune from private damage actions brought in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). The LASD contends that as an arm of the state, it is not a "person" within the meaning of section 1983 and, therefore, can not [sic] be held liable for the overdetentions.

The district court did not formally engage in an arm of the state analysis, instead relying upon the reasoning set forth in an unpublished memorandum and order from the Northern District of California. There, the court, using a somewhat informal arm of the state analysis itself, concluded that the Alameda County Sheriff was not an arm of the state because it was acting in an administrative capacity for the county. Upon consideration of the appropriate factors, however, we agree with the district

court's conclusion that the LASD is not an arm of the state and therefore does not enjoy Eleventh Amendment immunity.

In determining whether an entity is an arm of the state we inquire whether " 'the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials [or state entities] are nominal defendants.' " *Durning v. Citibank*, 950 F.2d 1419, 1423 (9th Cir. 1991) (alteration in original) (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)). This is a question of federal law, which "can be answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997).

We consider five factors when determining whether a governmental agency is an arm of the state:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Durning, 950 F.2d at 1423 (quoting *Mitchell v. Los Angeles Cmty Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (citations omitted)).

We are satisfied that the LASD is not acting as an arm of the state when administering the local county jails. First, the County, not the state, is financially liable for the LASD's actions in its capacity as the administrator of the

local jails. Cal. Gov. Code § 815.2. As established in *Sullivan v. County of Los Angeles*, 12 Cal.3d 710, 717 (1974), the County is liable specifically for the LASD's overdetention of individuals who have served a completed prison sentence – the very actions at issue here. *Id.* at 716-17. This factor, which weighs against the LASD's position, is the most important factor in identifying an arm of the state. *Durning*, 950 F.2d at 1424; *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981); *see also Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 49 (1994) (noting that, in determining whether an entity is an arm of the state, "the vast majority of Circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight" (omission in original) (internal quotation marks omitted)); *cf. Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that the Eleventh Amendment precludes federal courts from adjudicating suits where judgments against the state would be paid with state funds).

Second, conducting the AJIS checks is not a central government function, but the administration of a County policy. Put differently, the LASD does not act in a law enforcement capacity when administering the County's jail release policy. The sheriffs have exclusive responsibility for running the county jails. Cal. Gov. Code § 26605. But the counties retain the ultimate authority over the local jails through their fiscal and administrative oversight. Cal. Gov. Code §§ 23013, 25303. These laws establish that the relationship regarding the administration of the prisons system is between the counties and the

sheriffs, not the state and the sheriffs. There are no provisions in the California Constitution or code that grant the state control over the prisons via the sheriffs. Thus, in the cases at hand, the LASD is not performing a central government function for the state when conducting the pre-release AJIS checks. Rather, it performs this function at the behest of the County. This conclusion also weighs against considering the LASD an arm of the state.

Third, we have found that the LASD is a separately suable entity. As discussed above, in accordance with our holdings in *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 605 (9th Cir. 1986), and *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir. 1988), a local law enforcement agency can be considered a separably [sic] suable entity. This factor also weighs against the LASD's claim for immunity.

The record is bare with respect to the remaining two factors. We therefore find no factors weighing in favor of a finding that the LASD is an arm of the state, especially in view of our extensive analysis of the structure and relationships of the LASD in its operation of the County's jails. Accordingly, we hold that the LASD is not an arm of the state of California in its administration of the local county jails. Therefore, we conclude that the district court correctly rejected the LASD's claim of Eleventh Amendment immunity.

VI. CONCLUSION

For the foregoing reasons, the district court's orders denying the LASD's motions to dismiss and the County's motions to dismiss and for summary judgment are AFFIRMED.

APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VALERIE ANN STREIT, DIEGO SANTILLANA, and MICHAEL ROERICH individually, and as class representatives,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES, a governmental entity; LOS ANGELES

Case No. 98-9575 WJR

ORDER ON MOTIONS TO DISMISS

FILED MAR 25, 1999

IT IS SO ORDERED
DATED 3-24-99
/s/ William J. Rea
UNITED STATES DISTRICT JUDGE

COUNTY SHERIFF'S DEPARTMENT; UNDERSHERIFF JERRY HARPER, ASSISTANT SHERIFF MICHAEL GRAHAM, CHIEF BARRY KING, CHIEF BOB PASH, COMMANDER DANIEL BURT, and DOES 1 through 10, individually,

Defendants.

The motion of defendant Los Angeles County to dismiss plaintiffs' first and second causes of action, all defendants' motion to dismiss plaintiffs' third and fifth causes of action, and defendant Los Angeles County Sheriff's Department's motion to dismiss plaintiffs' Complaint came on regularly for hearing on March 8, 1999, before the Honorable William J. Rea.

After full consideration of the pleadings, the authorities and exhibits and declarations submitted by counsel as well as counsels' oral arguments, the Court orders as follows:

1. Defendant Los Angeles County Sheriff's Department's motion to dismiss plaintiffs' Complaint is denied. Plaintiffs' "Doe" amendment substituting the Los Angeles Sheriff's Department was proper and Defendant Los Angeles County Sheriff's Department is a public entity under California law. The holding of *County of Los Angeles v. Superior Court (Peters)* 68 Cal. App. 4th 1166

(1998) (county sheriff acts as a state officer performing law enforcement duties in setting policies concerning release of persons from the county jail), is not controlling here. The *Peters* court did not find that the county sheriff acts pursuant to state authority in all of its duties. There is a distinction apparent between law enforcement duties and operational or administrative duties. In the instant case there is no dispute that plaintiffs were entitled to be released and, in contrast to *Peters*, their overdetention had nothing to do with the sheriff's law enforcement function. The sheriff's conduct here at issue relates to a purely administrative function: once the plaintiffs became entitled to their releases, the sheriff had a duty to effectuate their releases.

2. Defendant County of Los Angeles' motion to dismiss plaintiffs' first and second causes of action relating to *Monell* liability is denied. Contrary to defendant County's allegations, the sheriff and sheriff's deputies were not state actors in reference to their actions in this case. They were acting on behalf of the county in their local duty of daily oversight and management of the county jail.

3. All defendants' motion to dismiss plaintiffs' third cause of action relating to liability under Cal. Civ. Code § 52.1 is granted. Under applicable case law, invidious discrimination is an element of a Cal. Civ. Code § 52.1 claim and plaintiffs have not alleged any invidious discriminatory animus.

4. All defendants' motion to dismiss plaintiffs' fifth cause of action for negligence is denied. Defendants had a duty to release plaintiffs within a reasonable period of

time after the reason for their incarceration terminated. Defendants' decisions regarding the enforcement or institution of *some* means to effectuate releases within a reasonable time are not discretionary, and, therefore, defendants are not protected by Cal. Govt. Code § 820.2 providing statutory immunity for discretionary acts.

The Indicated Ruling on these issues is to be attached to this Order as Exhibit A.

IT IS SO ORDERED.

PRESENTED BY:

JOHN C. BURTON
Lead Counsel
LAW OFFICES OF JOHN BURTON

TIMOTHY MIDGLEY
MANES & WATSON

ROBERT MANN
DONALD W. COOK
ATTORNEYS AT LAW

MARY ANNA HENLEY
ATTORNEY AT LAW

Attorneys for Plaintiff

By /s/ Mary Anna Henley
Mary Anna Henley

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: **Docket Number:** 2
CV-97-3826 WJR (Ex)
CV-98-9573 WJR (Ex)
CV-98-9574 WJR (Ex)
CV-98-9575 WJR (Ex)
CV-98-9695 WJR (Ex)

Title: Williams, et al. v. County of Los Angeles, et al.
Cleaves, et al. v. County of Los Angeles, et al.
Patchen, et al. v. County of Los Angeles, et al.
Streit, et al. v. County of Los Angeles, et al.
Shields v. County of Los Angeles, et al.

Date: Monday, March 8, 1999

Nature of Motion: (1) Defendant Los Angeles Sheriff's Department's Motion to Dismiss
(2) Defendants' Motion to Dismiss the First, Second, Third, and Fifth Causes of Action

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HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING[1]

The Court is inclined to DENY Defendant Los Angeles Sheriff's Department's Motion to Dismiss.

The Court is inclined to DENY Defendant County of Los Angeles' Motion to Dismiss the First and Second Causes of Action, and all Defendants' Motion to Dismiss the Fifth Cause of Action. However, the court is inclined to GRANT Defendants' Motion to Dismiss Plaintiffs' Third Cause of Action.

DISCUSSION

I. Defendant Los Angeles Sheriff's Department's Motion to Dismiss

A. Plaintiffs' "Doe" Amendments Were Proper

Defendant Los Angeles County Sheriff's Department ("LASD") first seeks to dismiss Plaintiffs' Complaints by alleging that Plaintiffs failed to follow proper procedure in substituting Defendant LASD as a "Doe" defendant. It is well-settled that there exists a one-year statute of limitations for naming and suing defendants in § 1983 actions brought in California. *See Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1462 (9th Cir. 1988). In each of these related cases, Defendant LASD was added as a "Doe" defendant within one year following the incident that gave rise to the suit. Accordingly, the Court is

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[1] The Court recognizes that not all motions were brought in each of the related cases. Accordingly, the tentative ruling applies only to the cases in which the relevant motions were filed.

inclined to find that Plaintiffs' amendments naming Defendant LASD as a "Doe" defendant were proper.[2]

B. The LASD is Amenable to Suit

Defendant LASD next seeks to dismiss Plaintiffs' Complaints by alleging that the LASD is not amenable to suit. Defendant LASD's main argument as to why the LASD is a non-suable entity rests on the recent California Appellate Court decision in *County of Los Angeles v. Superior Court (Peters)*, 68 Cal. App. 4th 1166 (1998). There, the Court held that "in setting policies concerning release of persons from the Los Angles County jail, the Los Angeles County Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the County of Los Angeles," and as such, the County is

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[2] Defendant LASD's sole argument as to why Plaintiffs' "Doe" amendments were improper is derived from *Optical Surplus Inc. v. Superior Court*, 279 Cal. Rptr. 194 (1991). However, Defendant LASD's reliance on this case is misplaced. *Optical* involved a situation where the plaintiff attempted to amend the Complaint to add a "Doe" defendant *eighteen months* after the original complaint was filed despite clear evidence that the plaintiff knew of the defendant's identity and facts supporting the wrongdoing at the time the original complaint was filed. *See id.* at 780-84. Although not explicitly stated by the *Optical* court, the plaintiff was attempting to add the defendant as a party after the statute of limitations had run. *See id.* at 783-84. It is only in those situations – where the statute of limitations has run – that a plaintiff must show that the defendant's identity and the facts supporting allegations of wrongdoing were unknown. As stated above, Plaintiffs filed the "Doe" amendments within the statute of limitations. Accordingly, the Court should find Plaintiffs' amendments proper.

not liable under § 1983. *Id.* at 1178. Where the LASD is deemed to be a "state actor," the LASD is immune from liability under Eleventh Amendment principles.

In *Peters,* the plaintiff was overdetained because the sheriff believed there was an outstanding warrant for the plaintiff's arrest. In response to the plaintiff's argument that the sheriff's position in effectuating the release of prisoners was merely administrative, the Court stated that "[t]his attempt to characterize the sheriff's conduct was merely operational or administrative is not persuasive *on the facts of this case.* The function involved in this case is *determining whether to release a person who may be subject to arrest on an outstanding warrant. This is a law enforcement function.*" *Id.* at 1177 (emphasis added).

However, the *Peters* court does not specifically find that the sheriff acts pursuant to state authority in all of its duties. Rather, there appears to be a distinction between the sheriff's law enforcement duties and the sheriff's operational or administrative duties. To this end, the Court finds *Granville v. Plummer,* 1999 WL 66513 (N.D. Cal. Feb. 8, 1999), instructive.

In *Granville,* the plaintiff sued the County and various named defendants, alleging civil rights violations resulting from defendants' failure to provide the plaintiff with outdoor exercise, and access to the law library and legal materials. The plaintiff had been placed in a single cell in the infirmary due to kidney failure the plaintiff experienced during incarceration. The defendants allegedly ignored or refused to grant the plaintiff's multiple requests for outdoor exercise and various other access.

While referencing the same decisions the *Peters* court relied on, the *Granville* court distinguished its case as follows: "the sheriff's department and its personnel were not involved in their law enforcement duties of investigating and enforcing the state criminal laws. Instead, the defendants were engaged in their local duty of daily oversight and management of the county jail. . . . This duty of day-to-day operation of a county jail is different from the sheriff department's duty of law enforcement and preserving the peace. . . . This difference is essential in finding that the sheriff's department and its personnel were representing the county when they allegedly engaged in the violations that plaintiff contends." *Id.* at *6.

In the instant cases, the overdetention had nothing to do with the sheriff's law enforcement function. In contrast to *Peters*, there is no dispute that Plaintiffs were entitled to be released. Once the Plaintiffs were ordered to be released, the Sheriff had a duty to effectuate that order. Accordingly, the sheriff's conduct at issue relates to a purely administrative function.

As such, the Court is inclined to find, distinct from the *Peters* holding, that where the Sheriff acts in a purely administrative manner such action is pursuant to their county, not state, authority.[3]

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[3] The Court notes that assuming the tentative is adopted – thereby finding that the LASD acts pursuant to county, not state, authority, in effectuating the release of persons where it is clear there is no legal cause for their continued detention – it is possible that having LASD remain as a named defendant may be unnecessary and superfluous. Accordingly, the Court is

Defendant LASD alternatively argues that – assuming *Peters* does not bar suit against the Sheriff's Department – the LASD is not a "public entity" amenable to suit. In partial support of this argument, Defendant cites to *Garcia v. County of Los Angeles*, 588 F. Supp. 700 (C.D. Cal. 1984), which, Defendant admits, the Ninth Circuit failed to follow in *Shaw v. Cal. Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 604-05 & n.1 (9th Cir. 1986). As such, *Garcia* no longer appears to be controlling law. Moreover, more recently, in *Jackson v. Alameda County Sheriff's Dep't*, 1993 WL 174896 (N.D. Cal. May 14, 1993), the Northern District Court of California stated, "Plaintiff has named the Alameda County Sheriff's Department as a defendant. The Sheriff's Department is a public entity for the purposes of service under California Law." *Id.* at *4 (citing *Shaw*, 788 F.2d 600; *Toscano v. Los Angeles County Sheriff's Dep't*, 155 Cal. Rptr. 146 (1979)).

Defendant LASD also contends that the amendment of Cal. Evid. Code § 669.1 in some way modified the definition of a "public entity." However, considering the above case law on point with this issue, the Court should not find Defendant LASD's interpretation of this amendment compelling. It appears, instead, that § 669.1 is only intended to be an evidentiary limitation for cases involving public employees, and is not intended to redefine a "public entity." Therefore, the Court should reject Defendant LASD's argument that the LASD is not a public entity.

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inclined to hear oral argument as to whether the LASD should be dismissed from this action.

Accordingly, the Court is inclined to deny Defendant LASD's Motion to Dismiss as Plaintiffs have properly amended their Complaints to add the LASD as a "Doe" defendant, and *Peters* does not bar suit against the LASD in this factual situation.

II. Defendants' Motion to Dismiss the First, Second, Third, and Fifth Causes of Action

A. First and Second Causes of Action (*Monell* liability)

The County of Los Angeles ("County") moves to dismiss Plaintiffs' First and Second Causes of Action under 42 U.S.C. § 1983. Defendant County argues, in reference to the activity in question, that the sheriffs were performing state law enforcement duties and therefore were acting on behalf of the State of California, not the County of Los Angeles. Therefore, Defendant County's argument here is predicated on a finding that the sheriffs were state actors with respect to their conduct in these cases.

However, as discussed in relation to the Sheriff's Department's Motion to Dismiss (*see supra* Part I), it appears that the sheriffs were not state actors, but they were acting on behalf of the County in the instant cases. Accordingly, the County's argument is without merit. Therefore, the Court should deny Defendant county's Motion to Dismiss the First and Second Causes of Action.

B. Third Cause of Action (Cal. Civ. Code § 52.1)

All Defendants move to dismiss Plaintiffs' Third Cause of Action, which alleges a violation of Cal. Civ. Code § 52.1, as Plaintiffs do not allege that their rights were violated in furtherance of some invidious discriminatory animus. Although § 52.1 does not state on its fact that invidious discrimination is an element of a claim under the statute, a California Appellate Court found that an allegation of such discrimination was necessary to state a claim under § 52.1. *See Boccato v. City of Hermosa Beach*, 29 Cal. App. 4th 1797, 1809 (1994).

Plaintiffs argue that the decision in *Boccato* does not affect all claims under § 52.1. However, the relevant language in *Boccato* was not tailored in any way and, accordingly, it appears to apply to all claims under § 52.1. Furthermore, several courts have read *Boccato* as imposing the broad requirement that all claims asserted under § 52.1 must include allegations of discriminatory animus. *See Dodd v. United States of America*, 1998 WL 355611, *2-*3 (9th Cir. June 15, 1998); *Nelson v. City of Irvine*, 143 F.3d 1196, 1206-07 (9th Cir. 1998); *Casabuela v. Browning-Ferris Industries*, 68 Cal. App. 4th 101, 111 (1998).

Plaintiffs essentially ask the Court to find that these cases decided subsequent to *Boccato*, are erroneous decisions in that they misinterpreted *Boccato*. However, Plaintiffs have not provided the Court with convincing evidence that the California Supreme Court would decide

the issue differently.[4] Furthermore, this Court is aware of authority from two separate California appellate courts, and two Ninth Circuit decisions interpreting *Boccato* that support Defendants' position on the matter. Accordingly, the Court is inclined to find that Plaintiffs' Third Cause of Action for a violation of Cal. Civ. code § 51.2 fails as a matter of law because it fails to allege any invidious discriminatory animus.

C. Fifth Cause of Action (Negligence)

All Defendants argue that Plaintiffs' Fifth Cause of Action for negligence must fail because (1) Defendants have no duty to treat Plaintiffs differently than other persons in custody merely because they are awaiting release, and (2) Defendants have statutory immunity from such liability.

1. Duty

While it is evident that "duty" is an element of a claim for negligence, Defendants argue that Plaintiffs must assert a mandatory statutory duty to proceed with their claim for negligence. However, it appears that the

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[4] Plaintiff argues that *Jones v. Kmart Corp.*, 17 Cal. 4th 329 (1998), demonstrates that allegations of a discriminatory motive are not necessary to state a claim under § 52.1. However, in *Jones*, the California Supreme Court does not address the issue at all. There, the California Supreme Court found that the plaintiff's claim lacked the requisite state action. The finding regarding state action was dispositive. Accordingly, it is unclear if there were any other problems with the plaintiff's claim.

law distinguishes between suits seeking liability against public entities and suits seeking liability against public employees.

Although a public entity is generally not directly liable for injuries resulting from an act or omission of the public entity, a public employee, or any other person, "where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge its duty." Cal. Govt. Code § 815.6; *see also* Cal. Govt. Code § 815. Accordingly, in order to state a claim for direct liability against the County of Los Angeles, the County must have a mandatory statutory duty. In contrast, public employees are generally subject to liability for injury caused by their acts or omissions to the same extent as a private person. *See* Cal. Govt. Code § 820(a).[5]

Notwithstanding the distinction regarding the source of the duty, it is evident that the public entities and the individual public employees involved in the instant cases had a duty to release Plaintiffs once their reason for incarceration terminated. *See* Cal. Pen Code. § 1384 ("If

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[5] Where a plaintiff asserts a valid claim against a public employee, the plaintiff may proceed against the public entity, such as the County and the Sheriff's Department in this case, based upon a theory of vicarious liability. *See* Cal. Govt. Code § 815.2(a).

the [court] directs that action to be dismissed, the defendant must, if in custody, be discharged therefrom."); Cal. Pen. Code § 1295 ("The defendant [upon posting bail] must be discharged from custody."); *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 715-16 (1974); *Shakespeare v. City of Pasadena*, 230 Cal. App. 2d 375, 384 (1964).

Despite significant evidence demonstrating the requisite duty, Defendants appear to also argue that there was not duty that established how fast Defendants were to release Plaintiffs after their release orders were issued. However, it is logical to employ a standard of reasonableness here. Moreover, Cal. Govt. Code § 815.6 indicates that public entities must exercise "reasonable diligence" in discharging their mandatory statutory duties. Accordingly, Defendants have a duty to release individuals, such as Plaintiffs, within a reasonable period of time. Reasonableness will be an issue for the jury.

2. Statutory Immunity

Defendants also argue that Plaintiffs' claims for negligence are barred because Defendants are entitled to statutory immunity that is provided to public employees for discretionary acts. Specifically, Defendants argue that failing "to adopt or enforce policies and procedures" to ensure prompt release of individuals, such as Plaintiffs, is a discretionary action, such that it is barred under Cal. Govt. Code § 820.2. Therefore, for clarification, the issue to be decided is whether it was within the discretion of the individually named Defendants to determine whether they should have adopted or enforced policies and procedures to ensure that Plaintiffs, who were entitled to be

released, were released within a reasonable amount of time.

The case law confirms that determining whether certain activity is "discretionary" can be a difficult process that requires "delicate decisions." *See Johnson v. State of California*, 69 Cal. 2d 782, 794 (1968). In an attempt to guide future courts in determining what qualifies as protected "discretionary" activity as opposed to non-protected activity, the California Supreme Court in *Johnson* proposed an approach that distinguishes between "planning" decisions and "operational" decisions. *See id.* This approach has been relied upon in many cases since that time. *See, e.g., Caldwell v. Montoya*, 10 Cal. App. 4th 972, 981 (1995), *Taylor v. Buff*, 172 Cal. App. 3d 384, 389 (1985).

After a court has ordered the release of incarcerated individuals, a jailer's decision to release such individuals within a reasonable amount of time appears to be an operational decision rather than a planning decision. *See Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998) (finding that LAPD officers were not immune, under Cal. Govt. Code § 820.2, from plaintiff's negligence claim based on his prolonged detention); *Sullivan v. County of Los Angeles*, 12 Cal. 3d at 722 n.11 ("Release of a prisoner after dismissal of charges against him is non-discretionary since it is specifically mandated by Penal Code section 1384."[6]). Moreover, it appears that the custodians must effectuate the order of the court either by enforcing pre-existing release procedures or adopting

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[6] Although this quotation is dicta, it supports the rationale of this decision and is useful for that purpose.

release procedures if none are in place. To argue that Defendants had discretion to not effectuate the release of Plaintiffs within a reasonable period of time is contrary to law.

Defendants admit that an inmate must be released once a release order is issued. Accordingly, there must be a mechanism in place to release these individuals within a reasonable period of time. Plaintiffs are not attacking a specific logistical aspect of their release. Rather, Plaintiffs are merely arguing that their release must be effectuated within a reasonable time and that Defendants were negligent with respect to this duty. While Defendants' decisions regarding the specific logistics of releases may be within their discretion, Defendants' decisions regarding the enforcement or institution of some means to effectuate releases within a reasonable time are not discretionary. Accordingly, the Court is inclined to deny Defendants' Motion to Dismiss the Fifth Cause of Action.

PROOF OF SERVICE BY MAIL

I am a resident of the county of Los Angeles; I am over the age of 18 and not a party to the within action; my business address is 35 South Raymond Ave., Suite 405, Pasadena, California, 91105.

On March 9, 1999, I served the within **[PROPOSED] ORDER ON MOTIONS TO DISMISS** on the interested parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Pasadena, California addressed as follows:

David D. Lawrence
Franscell, Strickland, Roberts & Lawrence
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005

Kevin C. Brazile
Principal Deputy County Counsel
County of Los Angeles
500 West Temple Street, Suite 648
Los Angeles, CA 90012

I declare under penalty of perjury that the above is true and correct.

Executed on March 9, 1999, at Pasadena, California.

/s/ Richard Thompson
Richard Thompson

APPENDIX C

DAVID D. LAWRENCE, State Bar No. 123039
SCOTT D. MacLATCHIE, Bar No. 115910
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Attorneys for Defendants COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF SHERMAN BOCK, UNDERSHERIFF, JERRY HARPER, ASSISTANT SHERIFF MICHAEL GRAHAM, CHIEF BARRY KING, CHIEF BOB PASH and COMMANDER DANIEL BURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MUNIQUE WILLIAMS, et al. Plaintiffs, vs. SHERIFF SHERMAN BOCK, et al. Defendants.	Case No. CV 97-3826 WJR (Ex) Case No. CV 98-9574 WJR (Ex) Case No. CV 98-9695 WJR (Ex) Case No. CV 98-9575 WJR (Ex) Case No. CV 98-9573 WJR (Ex) **The Honorable William J. Rea** **[~~Proposed~~] ORDER CERTIFYING FOR APPEAL ORDERS ON MOTIONS TO DISMISS** **28 U.S.C. § 1292(b)** (Filed May 25, 1999)

LEELLEN PATCHEN, et al.
Plaintiffs,
vs.
COUNTY OF LOS ANGELES, et al.
Defendants.

EDDIE SHIELDS,
Plaintiff,
vs.
COUNTY OF LOS ANGELES, et al.
Defendants.

VALERIE ANN STREIT, et. al.,
Plaintiffs,
vs.
COUNTY OF LOS ANGELES, et. al.,
Defendants.

RANDALL CLEAVES, et al.,
Plaintiffs,
vs.
COUNTY OF LOS ANGELES, et. al.,
Defendants.

Defendants COUNTY OF LOS ANGELES and LOS ANGELES COUNTY SHERIFF'S DEPARTMENT's motion for an order to certify for appeal, pursuant to 28 U.S.C. § 1292(b), this court's orders denying Defendants' Motions to Dismiss in all of the above-captioned cases can came on regularly for hearing on May 3, 1999 before the Honorable William J. Rea.

After full consideration of the pleadings and argument, the Court orders that the motion is granted. The issue of whether the Sheriff acts pursuant to county or state authority in carrying out its administrative and operational responsibilities for the county jail presents a controlling issue of law to which there exists a substantial ground for difference of opinion. Further, interlocutory appeal to resolve this issue will likely materially advance the ultimate termination of litigation in these cases. Accordingly, the Court certifies the following issues to be addressed to the Ninth Circuit through interlocutory review:

(1) Is there a distinction between the Sheriff's law enforcement duties and its administrative or operational duties?

(2) If a distinction can be made, does the Sheriff act pursuant to county authority in carrying out its administrative or operational duties?

(3) Further, in effectuating the release of individuals who are entitled to be released, does the Sheriff act in its administrative or operational capacity and therefore pursuant to county, not state, authority?

The court's ruling on these matters is to be attached to this Order as Exhibit A.

IT IS SO ORDERED.

Dated: May 25, 1999 /s/ William J. Rea
William J. Rea,
United States District Judge

Presented by:

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

By /s/ Chandra Gehri Spencer
Chandra Gehri Spencer
Attorneys for Defendants

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Docket Number: 5

Case Number: Case No. CV 97-3826 WJR (Ex)
Case No. CV 98-9573 WJR (Ex)
Case No. CV 98-9574 WJR (Ex)
Case No. CV 98-9575 WJR (Ex)
Case No. CV 98-9695 WJR (Ex)

Title: Williams, et al. v. County of Los Angeles, et al.
Cleaves, et al. v. County of Los Angeles, et al.
Patchen, et al. v. County of Los Angeles, et al.
Valerie Streit, et al. v. County of Los Angeles, et al.
Eddie Shields v. County of Los Angeles, et al.

Date: Monday, May 3, 1999

Nature of Motion: Defendants' Motion for Order Certifying for Appeal Orders on Motions to Dismiss

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HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING

The Court is inclined to GRANT Defendants' motion for an order certifying for interlocutory appeal this Court's orders on the motions to dismiss.

DISCUSSION

On March 8, 1999, after hearing oral argument, the Court adopted its tentative ruling and denied Defendants' Motions to Dismiss.[1] Defendants now request that the Court certify the orders embodying the March 8, 1999 rulings so that they may seek an interlocutory appeal.

The March 8, 1999 rulings held that where the conduct at issue focuses on the sheriff's department's administrative duty to effectuate the release of individuals who are entitled to such release, the Sheriff acts pursuant to county authority and, therefore, Eleventh Amendment

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[1] The Court notes that both motions to dismiss were not brought in all of the related cases. Rather, the motion to dismiss brought by Defendant Los Angeles Sheriff's Department was not filed in the *Patchen* case. Likewise, Defendants' Motion to Dismiss the First, Second, Third, and Fifth Causes of Action was not filed in the *Williams* case.

immunity principles are not invoked. Defendants argue that the holding in *County of Los Angeles v. Superior Court (Peters)*, 68 Cal. App. 4th 1166 (1998), dictates that the Sheriff represents the State in its operation of the county jail, and, therefore, both the County and the Sheriff cannot be held liable pursuant to Eleventh Amendment immunity principles.

This Court, in denying Defendants' motions to dismiss, found that there is a distinction between the Sheriff's law enforcement duties and the Sheriff's operational or administrative duties.[2] This distinction is significant in relation to an Eleventh Amendment immunity analysis as it appears that where the sheriff's department is carrying out its law enforcement duties, the law indicates that it is acting on behalf of the State. Conversely, where the sheriff's department is carrying out its operational or administrative duties, it is acting on behalf of the County. This Court's factual distinction rests on a close reading of *Peters*, *Pitts v. County of Kern*, 17 Cal. 4th 340 (1998), *McMillian v. Monroe County, Ala.*, 520 U.S. 781 (1997), and *Granville v. Plummer*, No. C 97-3513, 1999 WL 66513 (N.D. Cal. Feb. 8, 1999).[3]

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[2] The Court's findings and rationale as to this point are fully developed in its tentative ruling issued on March 8, 1999. (See attached.)

[3] The Court notes that Judge Pfaelzer recently identified the same distinction in *Williams, et al. v. City of Los Angeles, et al.*, No. CV 97-6730 (C.D. Cal. Mar. 5, 1999). In that case, Judge Pfaelzer found that the sheriff's department's practice of searching inmates upon returning to the general jail population subsequent to a court appearance constituted conduct pursuant to the Sheriff's administrative function. Moreover, the court

I. Legal Standard Governing Certification for an Interlocutory Appeal

"It is the basic policy of the federal courts that appellate review should not be conducted until after entry of final judgment." *Nobell, Inc. v. Sharper Image Corp.*, 24 U.S.P.Q.2d 1919, 1925 (N.D. Cal. 1992) (citing *Coopers & Lybrand v. Livesay*, 98 S. Ct. 2454, 2461 (1978)). However, an exception to this general rule is provided for under 28 U.S.C. § 1292(b). Specifically, 28 U.S.C. § 1292(b) allows courts to certify orders for the purposes of an interlocutory appeal where the "order involves [1] a controlling question of law as to which there is [2] substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The first and third factors are related as an issue is "controlling if resolution of the issue of appeal could materially affect the outcome of litigation in the district court." *Nobell*, 24 U.S.P.Q.2d at 1295 (quotations and citations omitted).

Since the federal courts have a strong policy of discouraging piecemeal litigation, it is well-settled that certifications for interlocutory appeals are to be ordered only in "exceptional cases." *See id.* Moreover, 28 U.S.C. § 1292(b) "was not intended merely to provide review of difficult rulings in hard cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1996).

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found that the Eleventh Amendment was not invoked because when the Sheriff is engaged in administrative duties, it is acting pursuant to county authority.

II. Application to the Instant Cases

A. Controlling Question of Law

The issue of whether the sheriff's department represents the County or the State in carrying out its administrative duties, apart from its law enforcement duties, appears to be a controlling question of law. Specifically, "[a] question is 'controlling' if its incorrect disposition would require reversal of the final judgment." *Cardona v. General Motors Corp.*, 939 F. Supp. 351, 353 (D.N.J. 1996). If Eleventh Amendment immunity applies here, as Defendants allege, it would render all but the individual Defendants, in their individual capacities, immune from liability in this action.

Moreover, a determination as to whether the Eleventh Amendment would apply in these cases directly impacts this Court's subject matter jurisdiction to hear the claims asserted against the County, the Sheriff's Department, and the individual Defendants in their official capacities. Specifically, where Eleventh Amendment immunity applies, this Court lacks jurisdiction to entertain suits brought against state entities. Accordingly, the Court is inclined to find that the contested issue presents a controlling question of law.

B. Substantial Ground for Difference of Opinion

Defendants contend that three orders recently issued within the Central District of California demonstrate a substantial ground for difference of opinion on this issue. However, two of the cases that Defendants cite can

readily be distinguished on their facts. Specifically, although *Bryant v. City of Los Angeles, et al.*, No. CV 98-4626 (C.D. Cal. April 7, 1999), involves over-detentions, the case deals with issues of police investigation that allegedly caused the delay of plaintiffs' release. Specifically, in footnote 6, the court noted that the Sheriff was carrying out law enforcement duties. The *Bryant court found, following the rationale of Peters,* that the Sheriff represents the State when he is engaged in law enforcement duties. This conclusion comports with the *Peters* finding that the Sheriff's obligation to "investigate public offenses" falls within the Sheriff's law enforcement function. *See Peters,* 68 Cal. App. 4th at 1175 (citing Cal. Govt. Code § 26602). Accordingly, this Court is inclined to find that the relevant opinion in *Bryant* does not conflict with this Court's ruling as this Court has distinguished between the Sheriff's law enforcement and administrative responsibilities.

Similarly, *Hawkins v. Comparet-Cassani,* 33 F. Supp. 2d 1244 (C.D. Cal. 1999), is distinguishable from the instant related cases. Specifically, in *Hawkins* the Sheriff was providing security to a state court – pursuant to court order – at the time of the challenged incident. Specifically, the court found that the Sheriff's responsibility to maintain the security of the state courts falls within the Sheriff's law enforcement function. *See id.* at 1253.

Additionally, pursuant to the understanding that the "municipal and superior courts are instruments of the State and are exempt from suit in federal courts by the Eleventh Amendment," and the Sheriff was acting pursuant to a state court order, the *Hawkins* court found "that the Sheriff was acting as a state rather than a county

policymaker." *Id.* Accordingly, the Court is inclined to find that neither *Bryant* nor *Hawkins* represent a substantial ground for difference of opinion on this issue.

There still remains, however, one order recently rendered within this district which appears to directly conflict with this Court's March 8, 1999 rulings. Specifically, in *Brass v. County of Los Angeles,* No. CV 98-2052 (D.C. Cal. Feb. 1, 1999), the court found, by following the *Peters* decision, that the Sheriff acts pursuant to state authority in overseeing the administrative release of prisoners. The facts of that case are directly on point as it involves the over-detention of an individual who was entitled to be released pursuant to a court order. The mere existence of this *Brass* opinion demonstrates that there is a substantial ground for difference of opinion as to whether the Sheriff is acting on behalf of the County or State when effectuating the release of prisoners who are entitled to be released.[4] Accordingly, the Court is inclined to find that there exists a substantial ground for difference of opinion as to a controlling question of law in these related cases.

C. Interlocutory Appeal is Likely to Materially Advance the Ultimate Termination of the Litigation

It is evident that a Ninth Circuit ruling as to the controlling question of law presented in the instant cases

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[4] Indeed, other courts have found that a substantial ground for difference of opinion was demonstrated where there were two conflicting district court opinions. *See Telectronics Proprietary, Ltd. v. Medtronic, Inc.,* 836 F.2d 1332, 1338 (Fed. Cir. 1988).

may significantly alter both this Court's jurisdiction over these cases, as well as the boundaries of the claims and defenses presented at trial. *See supra* Part II.A. The cases at issue are "big" cases in that they are fact-intensive and involves numerous plaintiffs. Having this issue decided on interlocutory appeal would likely "minimize 'the total burdens of litigation on the parties and the judicial system.' " *TCF Banking & Savings v. Arthur Young & Co.*, 697 F. Supp. 362, 366 (D. Minn. 1988) (quoting 16 Wright, Miller, Cooper & Gressman, Fed. Practice & Procedure, § 3930). Additionally, Defendants will most surely bring this issue up on appeal after verdicts are rendered, assuming the issue is not address [sic] via interlocutory review. As such, having a decision on this issue now may vary well speed the termination of all litigation in these cases.

III. Conclusion

It is understood, under *Peters*, that the Sheriff acts pursuant to state authority when carrying out its law enforcement duties. However, pursuant to 28 U.S.C. § 1292(b), it is evident that the issue of whether the Sheriff acts pursuant to county or state authority in carrying out its administrative and operational responsibilities for the county jail presents a controlling issue of law to which there exists a substantial ground for difference of opinion. Further, interlocutory appeal to resolve this issue will likely materially advance the ultimate termination of litigation in this case.

Accordingly, the Court certifies the following issues to be addressed by the Ninth Circuit through interlocutory review:

Is there a distinction between the Sheriff's law enforcement duties and its administrative or operational duties? If a distinction can be made, does the Sheriff act pursuant to county authority in carrying out its administrative or operational duties? Further, in effectuating the release of individuals who are entitled to be released, does the Sheriff act in its administrative and operational capacity, and therefore pursuant to county, not state, authority?

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV-97-3826 WJR (Ex)
CV-98-9573 WJR (Ex)
CV-98-9574 WJR (Ex)
CV-98-9575 WJR (Ex)
CV-98-9695 WJR (Ex)

Docket Number: 2

Title: Williams, et al. v. County of Los Angeles, et al.
Cleaves, et al. v. County of Los Angeles, et al.
Patchen, et al. v. County of Los Angeles, et al.
Streit, et al. v. County of Los Angeles, et al.
Shields v. County of Los Angeles, et al.

Date: Monday, March 8, 1999

Nature of Motion: (1) Defendant Los Angeles Sheriff's Department's Motion to Dismiss

(2) Defendants' Motion to Dismiss the First, Second, Third, and Fifth Causes of Action

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HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING[1]

The Court is inclined to DENY Defendant Los Angeles Sheriff's Department's Motion to Dismiss.

The Court is inclined to DENY Defendant County of Los Angeles' Motion to Dismiss the First and Second Causes of Action, and all Defendants' Motion to Dismiss the Fifth Cause of Action. However, the court is inclined to GRANT Defendants' Motion to Dismiss Plaintiffs' Third Cause of Action.

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[1] The Court recognizes that not all motions were brought in each of the related cases. Accordingly, the tentative ruling applies only to the cases in which the relevant motions were filed.

DISCUSSION

I. Defendant Los Angeles Sheriff's Department's Motion to Dismiss

A. Plaintiffs' "Doe" Amendments Were Proper

Defendant Los Angeles County Sheriff's Department ("LASD") first seeks to dismiss Plaintiffs' Complaints by alleging that Plaintiffs failed to follow proper procedure in substituting Defendant LASD as a "Doe" defendant. It is well-settled that there exists a one-year statute of limitations for naming and suing defendants in § 1983 actions brought in California. *See Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1462 (9th Cir. 1988). In each of these related cases, Defendant LASD was added as a "Doe" defendant within one year following the incident that gave rise to the suit. Accordingly, the Court is inclined to find that Plaintiffs' amendments naming Defendant LASD as a "Doe" defendant were proper.[2]

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[2] Defendant LASD's sole argument as to why Plaintiffs' "Doe" amendments were improper is derived from *Optical Surplus Inc. v. Superior Court*, 279 Cal. Rptr. 194 (1991). However, Defendant LASD's reliance on this case is misplaced. *Optical* involved a situation where the plaintiff attempted to amend the Complaint to add a "Doe" defendant eighteen months after the original complaint was filed despite clear evidence that the plaintiff knew of the defendant's identity and facts supporting the wrongdoing at the time the original complaint was filed. *See id.* at 780-84. Although not explicitly stated by the *Optical* court, the plaintiff was attempting to add the defendant as a party after the statute of limitations had run. *See id.* at 783-84. It is only in those situations – where the statute of limitations has run – that a plaintiff must show that the defendant's identity and the facts supporting allegations of wrongdoing were unknown. As

B. The LASD is Amendale to Suit

Defendant LASD next seeks to dismiss Plaintiffs' Complaints by alleging that the LASD is not amenable to suit. Defendant LASD's main argument as to why the LASD is a non-suable entity rests on the recent California Appellate Court decision in *County of Los Angeles v. Superior Court (Peters)*, 68 Cal. App. 4th 1166 (1998). There, the Court held that "in setting policies concerning release of persons from the Los Angles County jail, the Los Angeles County Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the County of Los Angeles," and as such, the County is not liable under § 1983. *Id.* at 1178. Where the LASD is deemed to be a "state actor," the LASD is immune from liability under Eleventh Amendment principles.

In *Peters*, the plaintiff was overdetained because the sheriff believed there was an outstanding warrant for the plaintiff's arrest. In response to the plaintiff's argument that the sheriff's position in effectuating the release of prisoners was merely administrative, the Court stated that "[t]his attempt to characterize the sheriff's conduct was merely operational or administrative is not persuasive *on the facts of this case*. The function involved in this case is *determining whether to release a person who may be subject to arrest on an outstanding warrant. This is a law enforcement function.*" *Id.* at 1177 (emphasis added).

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stated above, Plaintiffs filed the "Doe" amendments within the statute of limitations. Accordingly, the Court should find Plaintiffs' amendments proper.

However, the *Peters* court does not specifically find that the sheriff acts pursuant to state authority in all of its duties. Rather, there appears to be a distinction between the sheriff's law enforcement duties and the sheriff's operational or administrative duties. To this end, the Court finds *Granville v. Plummer*, 1999 WL 66513 (N.D. Cal. Feb. 8, 1999), instructive.

In *Granville*, the plaintiff sued the County and various named defendants, alleging civil rights violations resulting from defendants' failure to provide the plaintiff with outdoor exercise, and access to the law library and legal materials. The plaintiff had been placed in a single cell in the infirmary due to kidney failure the plaintiff experienced during incarceration. The defendants allegedly ignored or refused to grant the plaintiff's multiple requests for outdoor exercise and various other access.

While referencing the same decisions the *Peters* court relied on, the *Granville* court distinguished its case as follows: "the sheriff's department and its personnel were not involved in their law enforcement duties of investigating and enforcing the state criminal laws. Instead, the defendants were engaged in their local duty of daily oversight and management of the county jail. . . . This duty of day-to-day operation of a county jail is different from the sheriff department's duty of law enforcement and preserving the peace. . . . This difference is essential in finding that the sheriff's department and its personnel were representing the county when they allegedly engaged in the violations that plaintiff contends." *Id.* at *6.

In the instant cases, the overdetention had nothing to do with the sheriff's law enforcement function. In contrast to *Peters*, there is no dispute that Plaintiffs were entitled to be released. Once the Plaintiffs were ordered to be released, the Sheriff had a duty to effectuate that order. Accordingly, the sheriff's conduct at issue relates to a purely administrative function.

As such, the Court is inclined to find, distinct from the *Peters* holding, that where the Sheriff acts in a purely administrative manner such action is pursuant to their county, not state, authority.[3]

Defendant LASD alternatively argues that – assuming *Peters* does not bar suit against the Sheriff's Department – the LASD is not a "public entity" amenable to suit. In partial support of this argument, Defendant cites to *Garcia v. County of Los Angeles*, 588 F. Supp. 700 (C.D. Cal. 1984), which, Defendant admits, the Ninth Circuit failed to follow in *Shaw v. Cal. Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 604-05 & n.1 (9th Cir. 1986). As such, *Garcia* no longer appears to be controlling law. Moreover, more recently, in *Jackson v. Alameda County Sheriff's Dep't*, 1993 WL 174896 (N.D. Cal. May 14, 1993), the Northern District Court of California stated, "Plaintiff has named

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[3] The Court notes that assuming the tentative is adopted – thereby finding that the LASD acts pursuant to county, not state, authority, in effectuating the release of persons where it is clear there is no legal cause for their continued detention – it is possible that having LASD remain as a named defendant may be unnecessary and superfluous. Accordingly, the Court is inclined to hear oral argument as to whether the LASD should be dismissed from this action.

the Alameda County Sheriff's Department as a defendant. The Sheriff's Department is a public entity for the purposes of service under California Law." *Id.* at *4 (citing *Shaw*, 788 F.2d 600; *Toscano v. Los Angeles County Sheriff's Dep't*, 155 Cal. Rptr. 146 (1979)).

Defendant LASD also contends that the amendment of Cal. Evid. Code § 669.1 in some way modified the definition of a "public entity." However, considering the above case law on point with this issue, the Court should not find Defendant LASD's interpretation of this amendment compelling. It appears, instead, that § 669.1 is only intended to be an evidentiary limitation for cases involving public employees, and is not intended to redefine a "public entity." Therefore, the Court should reject Defendant LASD's argument that the LASD is not a public entity.

Accordingly, the Court is inclined to deny Defendant LASD's Motion to Dismiss as Plaintiffs have properly amended their Complaints to add the LASD as a "Doe" defendant, and *Peters* does not bar suit against the LASD in this factual situation.

II. Defendants' Motion to Dismiss the First, Second, Third, and Fifth Causes of Action

A. First and Second Causes of Action (*Monell* liability)

The County of Los Angeles ("County") moves to dismiss Plaintiffs' First and Second Causes of Action under 42 U.S.C. § 1983. Defendant County argues, in reference to the activity in question, that the sheriffs were

performing state law enforcement duties and therefore were acting on behalf of the State of California, not the County of Los Angeles. Therefore, Defendant County's argument here is predicated on a finding that the sheriffs were state actors with respect to their conduct in these cases.

However, as discussed in relation to the Sheriff's Department's Motion to Dismiss (*see supra* Part I), it appears that the sheriffs were not state actors, but they were acting on behalf of the County in the instant cases. Accordingly, the County's argument is without merit. Therefore, the Court should deny Defendant county's Motion to Dismiss the First and Second Causes of Action.

B. Third Cause of Action (Cal. Civ. Code § 52.1)

All Defendants move to dismiss Plaintiffs' Third Cause of Action, which alleges a violation of Cal. Civ. Code § 52.1, as Plaintiffs do not allege that their rights were violated in furtherance of some invidious discriminatory animus. Although § 52.1 does not state on its face that invidious discrimination is an element of a claim under the statute, a California Appellate Court found that an allegation of such discrimination was necessary to state a claim under § 52.1. *See Boccato v. City of Hermosa Beach*, 29 Cal. App. 4th 1797, 1809 (1994).

Plaintiffs argue that the decision in *Boccato* does not affect all claims under § 52.1. However, the relevant language in *Boccato* was not tailored in any way and, accordingly, it appears to apply to all claims under § 52.1.

Furthermore, several courts have read *Boccato* as imposing the broad requirement that all claims asserted under § 52.1 must include allegations of discriminatory animus. *See Dodd v. United States of America*, 1998 WL 355611, *2-*3 (9th Cir. June 15, 1998); *Nelson v. City of Irvine*, 143 F.3d 1196, 1206-07 (9th Cir. 1998); *Casabuela v. Browning-Ferris Industries*, 68 Cal. App. 4th 101, 111 (1998).

Plaintiffs essentially ask the Court to find that these cases decided subsequent to *Boccato*, are erroneous decisions in that they misinterpreted *Boccato*. However, Plaintiffs have not provided the Court with convincing evidence that the California Supreme Court would decide the issue differently.[4] Furthermore, this Court is aware of authority from two separate California appellate courts, and two Ninth Circuit decisions interpreting *Boccato* that support Defendants' position on the matter. Accordingly, the Court is inclined to find that Plaintiffs' Third Cause of Action for a violation of Cal. Civ. Code § 51.2 fails as a matter of law because it fails to allege any invidious discriminatory animus.

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[4] Plaintiff argues that *Jones v. Kmart Corp.*, 17 Cal. 4th 329 (1998), demonstrates that allegations of a discriminatory motive are not necessary to state a claim under § 52.1. However, in *Jones*, the California Supreme Court does not address the issue at all. There, the California Supreme Court found that the plaintiff's claim lacked the requisite state action. The finding regarding state action was dispositive. Accordingly, it is unclear if there were any other problems with the plaintiff's claim.

C. Fifth Cause of Action (Negligence)

All Defendants argue that Plaintiffs' Fifth Cause of Action for negligence must fail because (1) Defendants have no duty to treat Plaintiffs differently than other persons in custody merely because they are awaiting release, and (2) Defendants have statutory immunity from such liability.

1. Duty

While it is evident that "duty" is an element of a claim for negligence, Defendants argue that Plaintiffs must assert a mandatory statutory duty to proceed with their claim for negligence. However, it appears that the law distinguishes between suits seeking liability against public entities and suits seeking liability against public employees.

Although a public entity is generally not directly liable for injuries resulting from an act or omission of the public entity, a public employee, or any other person, "where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge its duty." Cal. Govt. Code § 815.6; *see also* Cal. Govt. Code § 815. Accordingly, in order to state a claim for direct liability against the County of Los Angeles, the County must have a mandatory statutory duty. In contrast, public employees are generally subject

to liability for injury caused by their acts or omissions to the same extent as a private person. *See* Cal. Govt. Code § 820(a).[5]

Notwithstanding the distinction regarding the source of the duty, it is evident that the public entities and the individual public employees involved in the instant cases had a duty to release Plaintiffs once their reason for incarceration terminated. *See* Cal. Pen Code. § 1384 ("If the [court] directs that action to be dismissed, the defendant must, if in custody, be discharged therefrom."); Cal. Pen. Code § 1295 ("The defendant [upon posting bail] must be discharged from custody."); *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 715-16 (1974); *Shakespeare v. City of Pasadena*, 230 Cal. App. 2d 375, 384 (1964).

Despite significant evidence demonstrating the requisite duty, Defendants appear to also argue that there was not duty that established how fast Defendants were to release Plaintiffs after their release orders were issued. However, it is logical to employ a standard of reasonableness here. Moreover, Cal. Govt. Code § 815.6 indicates that public entities must exercise "reasonable diligence" in discharging their mandatory statutory duties. Accordingly, Defendants have a duty to release individuals, such as Plaintiffs, within a reasonable period of time. Reasonableness will be an issue for the jury.

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[5] Where a plaintiff asserts a valid claim against a public employee, the plaintiff may proceed against the public entity, such as the County and the Sheriff's Department in this case, based upon a theory of vicarious liability. *See* Cal. Govt. Code § 815.2(a).

2. Statutory Immunity

Defendants also argue that Plaintiffs' claims for negligence are barred because Defendants are entitled to statutory immunity that is provided to public employees for discretionary acts. Specifically, Defendants argue that failing "to adopt or enforce policies and procedures" to ensure prompt release of individuals, such as Plaintiffs, is a discretionary action, such that it is barred under Cal. Govt. Code § 820.2. Therefore, for clarification, the issue to be decided is whether it was within the discretion of the individually named Defendants to determine whether they should have adopted or enforced policies and procedures to ensure that Plaintiffs, who were entitled to be released, were released within a reasonable amount of time.

The case law confirms that determining whether certain activity is "discretionary" can be a difficult process that requires "delicate decisions." *See Johnson v. State of California*, 69 Cal. 2d 782, 794 (1968). In an attempt to guide future courts in determining what qualifies as protected "discretionary" activity as opposed to non-protected activity, the California Supreme Court in *Johnson* proposed an approach that distinguishes between "planning" decisions and "operational" decisions. *See id.* This approach has been relied upon in many cases since that time. *See, e.g., Caldwell v. Montoya*, 10 Cal. App. 4th 972, 981 (1995), *Taylor v. Buff*, 172 Cal. App. 3d 384, 389 (1985).

After a court has ordered the release of incarcerated individuals, a jailer's decision to release such individuals within a reasonable amount of time appears to be an operational decision rather than a planning decision. *See*

Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998) (finding that LAPD officers were not immune, under Cal. Govt. Code § 820.2, from plaintiff's negligence claim based on his prolonged detention); *Sullivan v. County of Los Angeles*, 12 Cal. 3d at 722 n.11 ("Release of a prisoner after dismissal of charges against him is non-discretionary since it is specifically mandated by Penal Code section 1384."[6]). Moreover, it appears that the custodians must effectuate the order of the court either by enforcing pre-existing release procedures or adopting release procedures if none are in place. To argue that Defendants had discretion to not effectuate the release of Plaintiffs within a reasonable period of time is contrary to law.

Defendants admit that an inmate must be released once a release order is issued. Accordingly, there must be a mechanism in place to release these individuals within a reasonable period of time. Plaintiffs are not attacking a specific logistical aspect of their release. Rather, Plaintiffs are merely arguing that their release must be effectuated within a reasonable time and that Defendants were negligent with respect to this duty. While Defendants' decisions regarding the specific logistics of releases may be within their discretion, Defendants' decisions regarding the enforcement or institution of some means to effectuate releases within a reasonable time are not discretionary. Accordingly, the Court is inclined to deny Defendants' Motion to Dismiss the Fifth Cause of Action.

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[6] Although this quotation is dicta, it supports the rationale of this decision and is useful for that purpose.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Debra L. Ard, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 225 South Lake Avenue, Penthouse, Pasadena, CA 91101-3005.

On May 7, 1999, I served the foregoing **[Proposed] ORDER CERTIFYING FOR APPEAL ORDERS ON MOTIONS TO DISMISS** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

(SEE ATTACHED SERVICE LIST)

X BY MAIL

I placed such envelope for deposit in the U.S. Mail for service by the United States Postal Service, with postage thereon fully prepaid.

X As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business.

X (Federal) I declare under penalty of perjury, that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 7, 1999, at Pasadena, California.

/s/ Debra L. Ard
Debra L. Ard

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APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MUNIQUE WILLIAMS; et al., Plaintiffs-Respondents, v. SHERMAN BLOCK, Sheriff, individually and and in his official capacity; et al., Defendants-Petitioners.	No. 99-80120 DC# CV-97-3826-WJR Central California ORDER FILED JUL 26 1999

Before: HAWKINS and GRABER, Circuit Judges

The Clerk shall file respondents' June 14, 1999 opposition to the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 10 days of this order, petitioners shall perfect the appeal pursuant to Federal Rule of Appellate Procedure 5(d).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUNIQUE WILLIAMS, Plaintiff-Appellant, and MICHAEL E. WHITE, et al., Plaintiffs, v. COUNTY OF LOS ANGELES, et al., Defendants-Appellees.	Nos. 98-55609, 99-56041 99-56233 DC# CV-97-03826-WJR Central California (Los Angeles) (Filed Sep. 15, 1999)
VALERIE STREIT, et al., Plaintiffs-Appellees, v. COUNTY OF LOS ANGELES, et al., Defendants-Appellants.	Nos. 99-55897, 99-56233 DC# CV-98-09575-WJR Central California (Los Angeles)
EDDIE SHIELDS, Plaintiff-Appellee, v. COUNTY OF LOS ANGELES, et al., Defendants-Appellants.	Nos. 99-55898, 99-56233 DC# CV-98-09695-WJR Central California (Los Angeles)

RANDALL CLEAVES, et al., Plaintiffs-Appellees, v. COUNTY OF LOS ANGELES, et al., Defendants-Appellants.	Nos. 99-55899, 99-56233 DC# CV-98-09573-WJR Central California (Los Angeles)
LEELLEN PATCHEN, et al., Plaintiffs-Appellees, v. COUNTY OF LOS ANGELES, et al., Defendants-Appellants.	Nos. 99-56042, 99-56233 DC# CV-98-09574-WJR Central California (Los Angeles)
SAMUEL GLADNEY, Plaintiff-Appellee, v. COUNTY OF LOS ANGELES, et al., Defendants-Appellants.	No. 99-56310 DC# CV-99-00586-WJR Central California (Los Angeles) ORDER

On August 20, 1999, a telephone conference was held with Circuit Mediator Margaret A. Corrigan. John C. Burton and Mary Anna Henley participated on behalf of Munique Williams, et al.; Chandra Gehri Spencer participated on behalf of Sherman NMI Block, et al.

Appeal No. 98-55609 is released from the Mediation Program. All further inquiries regarding this appeal, including requests for extensions of time, should be directed to the Clerk's office.

The court has determined that this appeal nos. 99-55897, 99-55898, 99-55899, 99-56041, 99-56042, 99-56233 and 99-56310 will not be selected for inclusion in the Mediation Program. All further inquiries regarding these appeals, including requests for extensions of time, should be directed to the Clerk's office.

Appeal Nos. 99-56233 and 99-56310 are consolidated with previously consolidated appeal nos. 99-55897, 99-55898, 99-55899, 99-56041 and 99-56042.

The briefing schedule previously set by the court is amended as follows: appellants shall file an opening brief on or before November 1, 1999; appellees shall file an answering brief on or before December 1, 1999; appellants may file an optional reply brief within fourteen (14) days from the service date of the answering brief.

These seven consolidated appeals shall be calendared to be heard by the same panel which will consider the merits of appeal no. 98-55609. The Clerk of the Court is directed to schedule these eight appeals for the February 2000 Pasadena oral argument calendar.

Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further settlement discussions while these appeals are pending.

FOR THE COURT

/s/ Margaret A. Corrigan
Margaret A. Corrigan
Circuit Mediator

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VALERIE STREIT, individually and as class representative; DIEGO SANTILLANA, individually and as class representative; MICHAEL ROERICH, individually, Plaintiffs-Appellees, v. COUNTY OF LOS ANGELES, a governmental entity; JERRY HARPER, Undersheriff; MICHAEL GRAHAM, Assistant Sheriff; BARRY KING, Chief; BOB PASH, Chief; DANIEL BURT, Commander, Defendants-Appellants.	No. 99-55897 D.C. No. CV-98-09575-WJR ORDER (Filed Mar. 14, 2001)
EDDIE SHIELDS, individually and as a class representative, Plaintiff-Appellee, v. COUNTY OF LOS ANGELES, a governmental entity; JERRY HARPER, Undersheriff; MICHAEL GRAHAM, Assistant Sheriff; BARRY KING, Chief; BOB PASH, Chief; DANIEL BURT, Commander, Defendants-Appellants.	No. 99-55898 D.C. No. CV-98-09695-WJR

RANDALL CLEAVES, individually and as class representative; ALFRED CARRILLO, individually and as class representative,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES, a governmental entity; JERRY HARPER, Undersheriff; MICHAEL GRAHAM, Assistant Sheriff; BARRY KING, Chief; BOB PASH, Chief; DANIEL BURT, Commander,

Defendants-Appellants.

No. 99-55899

D.C. No. CV-98-09573-WJR

MUNIQUE WILLIAMS; MICHAEL E. WHITE; APRIL MARIE COURIE; ERIC MITCHELL; DIANE RAMIREZ, individually, and as class representative; HEATHER YOUSIF, individually, and as class representative; MARGO V. BORRUP, individually, and as class representative; QUINTON COOPER; RUBY SELLARS,

Plaintiffs-Appellees,

v.

No. 99-56041

D.C. No. CV-97-03826-WJR

SHERMAN BLOCK, Sheriff, individually and in his Official Capacity,

Defendant,

and

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendant-Appellant.

LEELLEN PATCHEN, individually and as class representative; STEVEN GRAY, individually and as class representative; ISAAC TCHAKMAKJIAN, individually and as class representative,

Plaintiffs-Appellees,

v.

COUNTY OF LOS ANGELES, a governmental entity; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Defendants-Appellants.

MICHAEL E. WHITE; APRIL MARIE COURIE; ERIC MITCHELL; DIANE RAMIREZ, individually and as class representative; HEATHER YOUSIF, individually and as

No. 99-56042

D.C. No. CV-98-09574-WJR

class representative; MARGO V. BORRUP, individually and as class representative; QUINTON COOPER; RUBY SELLARS; LEELLEN PATCHEN, individually and as class representative; STEVEN GRAY, individually and as class representative; ISAAC TCHAKMAKJIAN, individually and as class representative; EDDIE SHIELDS, individually and as class representative; DIEGO SANTILLANA, individually and as class representative; MICHAEL ROERICH, individually; RANDALL CLEAVES, individually and as class representative,

Plaintiffs-Appellees,

v.

SHERMAN NMI BLOCK, Sheriff, individually and in his official capacity,

Defendant,

and

COUNTY OF LOS ANGELES, a governmental entity; LOS ANGELES COUNTY SHERIFF [sic] DEPARTMENT as Doe 1,

Defendants-Appellants.

No. 99-56233

D.C. No. CV-97-03826-WJR

SAMUEL GLADNEY,

Plaintiff-Appellee,

v.

COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; ESTATE OF SHERMAN BLOCK; JERRY HARPER; MICHAEL GRAHAM; ROBERT MANN; BARRY KING; DANIEL BURT,

Defendants-Appellants.

No. 99-56310

D.C. No. CV-99-00586-WJR

MUNIQUE WILLIAMS; MICHAEL E. WHITE; APRIL MARIE COURIE; ERIC MITCHELL; DIANE RAMIREZ, individually, and as class representative; MARGO V. BORRUP, individually, and as class representative; QUINTON COOPER; RUBY SELLARS,

Plaintiffs-Appellees,

and

JOHNNY RAY TOLBERT; KEVIN BAXTER, individually and as class representatives and in their capacities as taxpayers; JOSEPH WHITNER, individually, and as class representative; YOLANDA CORBERT, individually, and as class representative; CASSONDRA MCNAIR,

No. 99-56766

D.C. No. CV-97-03826-WJR

individually, and as class representative; RONALD J. BORRUP, individually, and as class representative; KIRK DOUGLAS; JULIAN VALDEZ; FRANK LOPEZ; JOE SANCHEZ, JR.; MOISES CARRANZA; HAMID SHAHIAN; HERMAN WYCHE; DUC HUU PHAM; REGINA LANELL REED; ROY LEE WIMBERLY; GREGORY WHITE; EDWARD ALLEN PALMER,

Plaintiffs,

v.

SHERMAN BLOCK, individually and in his official capacity; JERRY HARPER, Undersheriff; MICHAEL GRAHAM, Assistant Sheriff; BARRY KING, Chief; DOES 1 THROUGH 1000, individually and in their official capacities,

Defendants,

and

COUNTY OF LOS ANGELES, a governmental entity,

Defendant-Appellant.

Before: PREGERSON, FERGUSON, and WARDLAW, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Pregerson and Wardlaw have voted to reject

the suggestion for rehearing en banc, and Judge Ferguson so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX G

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

CALIFORNIA CONSTITUTION ARTICLE V SECTION 13

§ 13. Attorney general; law enforcement

Sec. 13. Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

APPENDIX I

§ 22.2. Common Law – When Rule of Decision.

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State is the rule of decision in all the courts of this State.

APPENDIX J

CALIFORNIA GOVERNMENT CODE SECTION 200

SOVEREIGNTY OF THE STATE

§ 200. Exercise of state rights

The State has the rights prescribed in this article over persons within its limits, to be exercised in the cases and in the manner provided by law.

APPENDIX K

CALIFORNIA GOVERNMENT CODE SECTION 201

§ 201. Punishment for crime

The State may punish for crime.

APPENDIX L

CALIFORNIA GOVERNMENT CODE SECTION 202

SOVEREIGNTY OF THE STATE
Div. 1

§ 202. In prisonment or confinement

The state may imprison or confine for the protection of the public peace or health or of individual life or safety.

APPENDIX M

CALIFORNIA GOVERNMENT CODE SECTION 203

§ 203. Custody and restraint of certain persons

The State may establish custody and restraint of:

(a) Mentally ill persons, insane persons, chronic inebriates, and other persons of unsound mind.

(b) Paupers for the purposes of their maintenance.

(c) Minors for the purposes of their education, reformation, and maintenance.

APPENDIX N

CALIFORNIA GOVERNMENT CODE § 12524

§ 12524. Authority to call conferences of district attorneys, sheriffs and chiefs of police

The Attorney General may, from time to time, and as often as occasion may require, call into conference the district attorneys and sheriffs of the several counties and the chiefs of police of the several municipalities of this state, or such of them as he may deem advisable, for the purpose of discussing the duties of their respective offices, with the view of uniform and adequate enforcement of the laws of this state as contemplated by Section 13 of Article V of the Constitution of this state.

APPENDIX O

CALIFORNIA GOVERNMENT CODE SECTION 12550

CONSTITUTIONAL OFFICERS
Title 2

§ 12550. Supervisory power; reports; assistance; investigations and prosecutions

The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge.

When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpenas or other process.

APPENDIX P

CALIFORNIA GOVERNMENT CODE SECTION 12560

§ 12560. Supervisory power; reports; investigation or detection of crime

The Attorney General has direct supervision over the sheriffs of the several counties of the State, and may require of them written reports concerning the investigation, detection and punishment of crime in their respective jurisdictions. Whenever he deems it necessary in the public interest he shall direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and he may direct the service of subpenas, warrants of arrest, or other processes of court in connection therewith.

APPENDIX Q

CALIFORNIA GOVERNMENT CODE § 23013

§ 23013. Department of corrections; establishment; jurisdictions; joint department of corrections in two or more counties

The board of supervisors of any county may, by resolution, establish a department of corrections, to be headed by an officer appointed by the board, which shall have jurisdiction over all county functions, personnel, and facilities, or so many as the board names in its resolution, relating to institutional punishment, care, treatment, and rehabilitation of prisoners, including, but not limited to, the county jail and industrial farms and road camps, their functions and personnel.

The boards of supervisors of two or more counties may, by agreement and the enactment of ordinances in conformity thereto, establish a joint department of corrections to serve all the counties included in the agreement, to be headed by an officer appointed by the boards jointly.

APPENDIX R

CALIFORNIA GOVERNMENT CODE § 25303

§ 25303. Supervision of officers

The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county relate to the assessing, collecting, safekeeping, management, or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection.

This section shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.

Nothing contained herein shall be construed to limit the budgetary authority of the board of supervisors over the district attorney or sheriff.

APPENDIX S

CALIFORNIA GOVERNMENT CODE § 26605

§ 26605. Jails and prisoners

The sheriff shall take charge of and keep the county jail and the prisoners in it.

---

§ 26605. Jails and prisoners; authority; exception

* * * *Notwithstanding any other provision of law, except in counties in which the sheriff, as of July 1, 1993, is not in charge of and the sole and exclusive authority to keep the county jail and the prisoners in it,* the sheriff shall take charge of and *be the sole and exclusive authority to* keep the county jail and the prisoners in it, *except for work furlough facilities where by county ordinance the work furlough administrator is someone other than the sheriff.*

APPENDIX T

CALIFORNIA PENAL CODE § 4015

§ 4015. Receipt of persons committed; food, clothing and bedding; standards; expense; costs of medical care

(a) The sheriff shall receive all persons committed to jail by competent authority. The board of supervisors shall provide the sheriff with necessary food, clothing, and bedding, for those prisoners, which shall be of a quality and quantity at least equal to the minimum standards and requirements prescribed by the Board of Corrections for the feeding, clothing, and care of prisoners in all county, city and other local jails and detention facilities. Except as provided in Section 4016, the expenses thereof shall be paid out of the county treasury.

(b) Nothing in this section shall be construed in a manner that would requirethe sheriff to receive a person who is in need of immediate medical care until the person has been transported to a hospital or medical facility so that his or her medical needs can be addressed prior to booking into county jail.

(c) Nothing in this section shall be construed or interpreted in a manner that would impose upon a city or its law enforcement agency any obligation to pay the cost of medical services rendered to any individual in need of immediate medical care who has been arrested by city law enforcement personnel and transported to a hospital or medical facility prior to being delivered to and received at the county jail or other detention facility for booking.

(d) It is the intent of the Legislature in enacting the act adding this subdivision to ensure that the costs associated with providing medical care to an arrested person are borne by the arrested person's private medical insurance or any other source of medical cost coverage for which the arrested person is eligible.

MOTION FILED
JUL 13 2001

No. 00-1863

In The

Supreme Court of the United States

COUNTY OF LOS ANGELES, et al.,

Petitioners,

v.

VALERIE ANN STREIT et al.,

Respondents,

AND RELATED ACTIONS.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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28 pp

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. The Association sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case will have a dramatic and adverse effect on California counties.

In *Streit v. County of Los Angeles*, 236 F.3d 552 (CA9 2001), the Ninth Circuit Court of Appeals has published an opinion which holds California sheriffs function on behalf of counties when they adopt and carry out policies related to the release of inmates from custody. If this opinion survives, counties will be forced to defend § 1983 actions in federal court which would be summarily dismissed by the courts of California. Moreover, they will be forced to litigate and appeal the question of governmental immunity repeatedly in every overdetention case. Consequently, *Amicus Curiae* has a significant interest in obtaining review of this decision in this Court.

CSAC has obtained consent of the petitioners to the filing of this brief. However, despite numerous attempts to contact respondents and obtain consent from them, CSAC has not received any response from respondents

regarding this issue. Consequently, *Amicus Curiae* respectfully requests that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties. The Association sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case will have a dramatic and adverse affect on California counties.[1]

In *Streit v. County of Los Angeles,* 236 F.3d 552 (CA9 2001), the Ninth Circuit Court of Appeals has published an opinion which holds California sheriffs function on behalf of counties when they adopt and carry out policies related to the release of inmates from custody. This opinion is at odds not only with established California precedent (which holds that sheriffs perform such functions as officials of the State of California), it ensures that the state's concurrent jurisdiction over claims alleging "over-detention" of inmates is effectively eliminated. If the Ninth Circuit's opinion survives, counties will be forced to defend § 1983 actions in federal court which would be summarily dismissed by the courts of California. Moreover, they will be forced to litigate and appeal the

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae,* its members or its counsel made a monetary contribution to the preparation or submission of this brief.

question of governmental immunity repeatedly in every overdetention case. Consequently, *Amicus Curiae* has a significant interest in obtaining review of the Ninth Circuit's decision in this Court.

ISSUES ADDRESSED BY *AMICUS CURIAE*

1. May the Ninth Circuit reject the determination of California appellate courts that a sheriff adopts policies regarding the release of prisoners in his capacity as an official of the State of California, subject to the control of the California Attorney General? If so, did the Ninth Circuit correctly interpret California law on this matter?

2. Should the Ninth Circuit be allowed to continue developing case law designed to limit the scope of available governmental immunity defenses, even where such a limitation is in direct conflict with the opinions of this Court, the California Supreme Court, and the California Courts of Appeal?

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California should be permitted to determine who works for it. California has decided, based upon provisions in its state Constitution, state statutes, and recent case law interpreting those provisions in light of *McMillian v. Monroe County*, 520 U.S. 781 (1997), that its district attorneys, sheriffs and judges function on behalf of the State of California when they set policies related to the operation of their respective offices. In *Streit*, the

Ninth Circuit refused to defer to California courts' interpretation of state law and engaged in a *de novo* assessment of that law which is analytically erroneous and contrary to United States Supreme Court precedent.

In *McMillian*, 520 U.S. 781, 793, this Court ruled that sheriffs in Alabama act on behalf of the state, not the county, when they formulate policy. Consequently, they are immune from suit under § 1983. *Id.* at 782. In reaching this conclusion, the Court held that in determining whether a sheriff is an agent of the state, the federal district court's analysis *must be governed by state law. Id.* at 786 ("[W]hether a particular official has final policymaking authority is a question of *state* law," quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989), internal quotations omitted, emphasis in original).

Applying *McMillian* in *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823 (1998), the California Supreme Court held that California district attorneys act as agents of the state of California in formulating policies and procedures related to their official functions. Then, in *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), the California Court of Appeal applied *McMillian* and *Pitts* and concluded that sheriffs also act on behalf of the State of California when they formulate policies and procedures for the release of prisoners from custody. The California Supreme Court subsequently denied review.

As the *Peters* court noted, its conclusion was compelled by the virtually identical statutory language which describes the duties of California sheriffs and district attorneys and provides both elected public officials are

accountable only to the voters and the California Attorney General. Their independence from local control eliminates any risk that the board of supervisors will use the sheriff or the prosecutor to investigate and prosecute political opponents or protect political allies. This interpretation of California law is binding on federal courts: "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *see also Martinez v. Gomez*, 137 F.3d 1124, 1126 (CA9 1998) ("our role is to determine what California law is, not what it should be").

California law also makes state court judges agents of the State of California, protected by Eleventh Amendment immunity from suit under Section 1983. *See, e.g., Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (CA9 1987) (relying on California constitution and case law). All three of these independently elected public officials are held to be agents of the State of California, even though their authority is limited to the county that elects them. A county board of supervisors cannot interfere with a district attorney's prosecutorial decisions, cannot interfere with a judge's decisions, and cannot interfere with a sheriff's decisions regarding investigation and detection of crime or operation of the jails. All three are agents of the State of California; all three are protected by Eleventh Amendment immunity.

Consistent with the California Supreme Court's decision in *Pitts*, the Ninth Circuit has ruled that district attorneys act on behalf of the State of California and are consequently immune from liability under Section 1983.

Weiner v. County of San Diego, 210 F.3d 1025 (CA9 2000). The decision in *Streit*, however, veers off in a new and dangerous direction.

In *Streit*, the Court of Appeals purports to draw a distinction – drawn by neither state courts nor this Court – between a sheriff's law enforcement functions (which it defines as state duties) and mere administrative duties (which it finds are county functions). This distinction does not bear analysis and ignores the historical function of sheriffs elucidated by this Court in *McMillian v. Monroe County*, 520 U.S. 781, 794. In fact, it directly contradicts this Court's conclusion that there is no distinction between law enforcement and administrative functions of a sheriff. As the Court observed, " 'In the exercise of executive *and administrative* functions . . . , he (the sheriff) represents the sovereignty of the State. . . . ' " *Id.* (Emphasis added.)

The Court of Appeals also creates a distinction regarding the source of the controlling law on this topic by asserting that the determination of whether a sheriff is an agent of the state of California is an issue of federal law: "Although we must consider the state's legal characterization of the government entities which are parties to these actions, federal law provides the rule of decision in section 1983 actions." *Streit*, 236 F.3d at 560. This statement is meaningless, as there is no federal law that establishes the relationship between a sheriff and the state of California. There is nothing in the United States Code or the United States Constitution that establishes this relationship. California statutes and the California Constitution establish this relationship.

The only possible meaning of this statement is to provide cover for creating an interpretation of California law that contradicts the interpretation of the California courts. The *Streit* opinion demonstrates the emptiness of this statement by proceeding to analyze California statutes to reach its conclusion that the Los Angeles County Sheriff is an agent of the County. If the Court of Appeals accurately states that the issue is one of federal law, then where are the federal statutes that lead to this conclusion? They are absent from the opinion because the practical truth of the matter is that there is nowhere to look but California law on this issue.

By publishing an opinion about state law which contradicts state law as decided by California courts, the Ninth Circuit has ensured that questions of county liability and governmental immunity will be determined differently depending on the forum selected by plaintiffs. California state courts are bound by *Peters*. District courts in California will be bound by *Streit*. This means that the result in a given case will depend on whether a plaintiff files his or her § 1983 claims in state or federal court. This Court should intervene in this action to prevent these conflicting outcomes. Accordingly, *Amicus Curiae* urges the Court to grant the petition for certiorari and overturn the decision of the Court of Appeals.

LEGAL ARGUMENT

1. THE NINTH CIRCUIT'S ERRONEOUS APPLICATION OF *McMILLIAN* HAS CREATED A SERIOUS CONFLICT WITH CALIFORNIA'S INTERPRETATION OF STATE LAW, WHICH HOLDS THAT CALIFORNIA SHERIFFS FUNCTION AS STATE OFFICERS WHEN IMPLEMENTING POLICIES REGARDING THE RELEASE OF PRISONERS FROM CUSTODY.

A. *Streit* Conflicts With California Courts' Interpretation Of California Law And Is Inconsistent With This Court's Decisions.

Under California law, a county board of supervisors cannot order the sheriff to put anyone in jail, or let anyone out. A county, therefore, cannot be liable for the sheriff's policies relating to keeping prisoners in jail or releasing prisoners from jail. California sheriffs are agents of the State of California for the purposes of § 1983 claims, not agents of the counties.

In *McMillian v. Monroe County*, 520 U.S. 781, this Court explained that, in determining whether a local sheriff is subject to § 1983 liability under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), "A court's task is to identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *McMillian*, at 784-85, quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989). That inquiry is, in turn, "dependent on an analysis of state law." *Id.* at 786.

In California, it is settled that in administering the jails, establishing policies for the release of prisoners, and other law enforcement duties, a sheriff acts on behalf of the State of California, not the county in which he or she was elected. *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998). As the California Court of Appeal observed in *Peters*, the State Attorney General is the official with "final policymaking authority" over a sheriff's law-enforcement-related conduct: "[A]rticle V, § 13 of the California Constitution provides, 'Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. . . . The Attorney General shall have direct supervision over every . . . sheriff . . . in all matters pertaining to the duties of [his or her] . . . office[ ]. . . . ' " *Peters*, 68 Cal.App.4th at 1174, 80 Cal.Rptr.2d at 865.

California sheriffs are required to enforce the state criminal law, Cal. Government Code §§ 26600-26602, and *state* law provides the authority for a sheriff to "take charge of and keep the county jail and the prisoners in it." Cal. Government Code § 26605; see also Cal. Penal Code § 4000. A county board of supervisors "ha[s] no direct control over how [sheriffs] perform" this function. *Peters*, 69 Cal.App.4th at 1175, 80 Cal.Rptr.2d at 866; *Brandt v. Board of Supervisors*, 84 Cal.App.3d 598, 601, 602, 147 Cal.Rptr. 468 (1978).

Based upon these provisions of California law – and the fact the California Supreme Court has interpreted mirror provisions relating to district attorneys in exactly the same way – the *Peters* court concluded, "[T]he sheriff operates the jail pursuant to the sheriff's constitutional and statutory law enforcement powers, and not as a

policymaker for the board of supervisors, which has no direct control over the sheriff in this regard. [Citations.]" *Peters*, 68 Cal.App.4th at 1177, 80 Cal.Rptr.2d at 867. That is, the sheriff has no superior within his own county.

This determination that a sheriff is the agent of the State of California is binding on federal courts. This issue is just as much an issue of state law in relation to Section 1983 as is, for example, the statute of limitations. It is well settled that state statutes of limitation and court decisions interpreting those statues are binding on federal courts. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Likewise here, the state statutes and court decisions on this issue are binding on federal courts.

Despite the clear explication of California law provided by California appellate courts, the Ninth Circuit has conducted its own evaluation of California law, reinterpreted it, reweighed its provisions, and reached the opposite conclusion. In *Streit*, the Court of Appeals has held that sheriffs act as county officers when they develop policies related to the release of prisoners, not as officers of the State. Although it acknowledged the existence of the provisions of law discussed above, the court concluded that California Government Code § 25303 provides the "crucial factor," as it grants county boards of supervisors "broad fiscal and administrative powers for the management of the individual county jails. . . . " *Streit v. County of Los Angeles*, 236 F.3d 552, 561 (CA9 2001).

In reasoning to its conclusion, the Ninth Circuit ignored the fact that, although counties are required to fund the sheriff's office, this same Government Code section prohibits interference with the sheriff's duties.

County boards of supervisors have "*no right to control* the operation of the jail[s]; [moreover,] a board of supervisors has no legal authority to use its budgetary power to control employment in or operation of the sheriff's office." *Peters*, 68 Cal.App.4th at 1176, 80 Cal.Rptr.2d at 1176 (emphasis added); *see also Board of Supervisors of SD County v. Superior Court (Armstrong)*, 33 Cal.App.4th 1724, 39 Cal.Rptr.2d 906 (1995) (county board of supervisors improperly found in contempt of court for violating court order capping jail population where sheriff, not county, controls day-to-day jail operations and inmates' lengths of stay); *Lassen County v. State of California*, 4 Cal.App.4th 1151, 6 Cal.Rptr.2d 359 (1992) (jail operations remain a state function despite state laws placing financial responsibility for jail operations on county board of supervisors, including costs to defend suits by inmates alleging unconstitutional conditions).

By refusing to accept the California courts' interpretation of its own state law, the Ninth Circuit has created federal law which is in direct conflict with the law of the forum state. Moreover, as a result of its free-wheeling transformation of state legal principles, the Ninth Circuit has developed federal law in a manner which will result in inconsistent results and remedies being granted litigants, depending on which forum a plaintiff chooses.

B. The Ninth Circuit's Holding is Based upon a Conception of a Sheriff's Functions Which is Historically Inaccurate and Fundamentally Flawed

In deciding the *McMillian* case, this court recognized that, historically, a sheriff " 'represents the sovereignty of the State and he has no superior in his county.' " *McMillian v. Monroe County*, 520 U.S. at 794, quoting 1 W. Anderson, A Treatise on the Law of Sheriffs, Coroners and Constables 5 (1941). This conclusion was equally applicable in the context of a sheriff's executive *and administrative* activities: " 'In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State. . . . ' " (*Ibid.*)

Despite this clear and inclusive description, the Ninth Circuit has purported to draw a distinction between what it views as legitimate law enforcement functions and administrative or "management" functions, which it erroneously opines are subject to oversight by the county. *Streit* at 561. This distinction is both historically and practically untenable. Historically, it simply is wrong. As the text quoted above demonstrates, the law does not change, whether the issue concerns the sheriff's executive or administrative functions. Either way, the sheriff functions as a state officer. As a practical matter, the Ninth Circuit's determination is out of touch with reality and fundamentally inconsistent with clear provisions of California law, which make sheriffs subject to the control of the California Attorney General, not county boards of supervisors. Just as in Alabama, a California

sheriffs only superior is outside the county – that is, the Attorney General.

Finally, the Ninth Circuit opinion does not explain why the release of a prisoner into the community is not a law enforcement function. Victims who are occasionally terrorized by prisoners mistakenly released invariably complain that the sheriff has failed to do his job of enforcing the law and protecting the citizenry. A fictional distinction which holds that, in releasing prisoners from incarceration, the sheriff does not represent the state but instead is merely performing a management function which is administrative and local in nature, would doubtless appall victims of crime – and it does not bear close analysis.

C. If the Ninth Circuit's Novel Interpretation of California Law Is Permitted to Survive, the State's Concurrent Jurisdiction over Actions Alleging "Overdetention" Brought Pursuant to 42 U.S.C. § 1983 Will Be Effectively Eliminated.

It is well established that state courts of general jurisdiction have concurrent authority to adjudicate federally created causes of action. *Testa v. Katt*, 330 U.S. 386, 389-93 (1947). Consequently, California state courts have concurrent jurisdiction over actions brought under 42 U.S.C. § 1983. *Felder v. Casey*, 487 U.S. 131, 139 (1988). But if the Ninth Circuit's opinion in *Streit* is allowed to survive, the filing in California state courts of § 1983 claims alleging "overdetention" of prisoners will abruptly cease.

Given the California Court of Appeal's decision in *Peters*, such actions currently meet a rather speedy end in

state court. On the other hand, plaintiffs who decide to file the same action a block away in the federal district court can be assured of years of process there which California courts have decided is not "due." Such an anomalous and inconsistent approach will effectively eliminate the concurrent jurisdiction of California trial courts in § 1983 actions and should not be countenanced.

Amicus understands the present case involves a federal question, and likewise realizes that *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) was a case in which the court's jurisdiction was, instead, based on diversity of citizenship. While it may be that this Court "has so far avoided the choice-of-law issue in non-diversity cases," *Federal Deposit Ins. Corp. v. Timbalier Towing Co., Inc.*, 497 F.Supp. 912, 919 n. 6 (N.D. Ohio 1980), the same policy concerns which this Court considers in *Erie* cases are implicated here.

In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941), this Court held:

> "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. *Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.* [Citation.] Any other rule would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. . . . It is not for the federal courts to thwart . . . local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to

> determine whether a given matter is to be governed by the law of the forum or some other law. [Citation.] . . . And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (Emphasis added.)

Unless this Court grants certiorari and overrules the Ninth Circuit's *Streit* decision, the "principle of uniformity within a state" with which this Court was concerned in *Klaxon* will be thoroughly thwarted in California. Coordinate state and federal courts which "sit[ ] side by side" will continue to issue inconsistent rulings based on different views of what the law of California provides. Consequently, *Amicus Curiae* urges the Court to grant the petition for certiorari, to reaffirm that "whether a particular official has 'final policymaking authority' is a question of *state law*," *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988), and to reverse the Court of Appeals.

2. THE NINTH CIRCUIT'S LINE OF CASES LIMITING THE SCOPE OF AVAILABLE IMMUNITY DEFENSES IS INCONSISTENT WITH DECISIONS OF THIS COURT.

A. *Streit* Represents the Ninth Circuits' Latest Attempt to Limit the Scope of Available Immunity Defenses.

Streit represents the latest in a string of Ninth Circuit cases that attempt to limit the scope of available immunity defenses in the context of claims for excessive force, legislative immunity, and now Eleventh Amendment immunity. This disturbing trend cannot be allowed to continue.

(1) Ninth Circuit Limitations on Immunity in Excessive Force Cases

In *Katz v. United States*, 194 F.3d 962 (CA9 1999), overruled by *Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151 (2001), the Ninth Circuit affirmed the denial of defendants' motion for summary judgment on the defense of qualified immunity where plaintiff alleged civil rights violations based on his forcible removal from public speech at the Presidio Army Base in San Francisco. Katz claimed that the officers took his arms, half-walking and half-dragging him, to a military van and shoved him inside. Following a brief detention, Katz, who suffered no injuries, was released. The Ninth Circuit reasoned that a dispute of material fact existed concerning whether excessive force was used to remove plaintiff.

This Court reversed, stating that while there was no doubt that *Graham v. Connor*, 490 U.S. 386 (1989), clearly established the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness, such an inquiry was insufficient. *Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151 (2001). Instead, the Court held that the right which is allegedly violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 121 S.Ct. at 2156, *citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Thus, *Saucier* demonstrates that the Ninth Circuit's reasoning is inconsistent with this Court on the issue of the scope of available immunity defenses. Unfortunately,

this divergence of views extends not only to qualified immunity for excessive force; it spills over to all potential governmental immunity defenses.

(2) The Ninth Circuit's Attempt to Limit Legislative Immunity

In *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998), this Court held that "local legislators are . . . absolutely immune from suit under § 1983 for their legislative activities." In so holding, the Court noted that, "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.' " *Id.* at 54, quoting *Tenny v. Brandhove*, 341 U.S. 367, 376 (1951). This ruling is consistent with California's view of expansive immunity for local legislators. *See Caldwell v. Montoya*, 10 Cal.4th 972, 976, 42 Cal.Rptr.2d 842 (1995) ("[D]iscretionary act immunity extends to basic governmental policy decisions entrusted to broad official judgment. . . . *This immunity applies even where the dismissed official alleges that the members' votes were cast for reasons that violated FEHA.*" (Emphasis added, internal quotations and citations omitted)).

Although the California analysis concerns discretionary immunity as codified by California Government Code § 820.2, the rationale employed by the court is consistent with the views expressed in *Bogan*. The bench – whether state or federal – should not be permitted to look behind a legislator's vote to determine the political considerations which may have motivated it. Such an entitlement would turn the judiciary into the "thought police" and

encourage dangerous speculation about subjective machinations which are impossible to divine.

Nevertheless, in *Navarro v. Block*, 250 F.3d 729 (CA9 2001), the Ninth Circuit held that qualified immunity did not apply to a § 1983 lawsuit against the board of supervisors which alleged that prior "bad faith" votes to indemnify police officers for punitive damage awards in unrelated cases were the impetus behind alleged civil rights violations. Thus, not only was the issue of absolute immunity left unaddressed, the Ninth Circuit held that it was clearly established that local legislators were not entitled to qualified immunity if they voted to indemnify officers in "bad faith." *Navarro* at 729. Such an attempt to limit the scope of available immunity defenses is in clear violation of the expanded notions of qualified immunity articulated by this Court in *Bogan* and illustrates the Ninth Circuit's concerted efforts to chip away at available immunity defenses in general.

(3) *Streit*'s Attempt to Limit Eleventh Amendment Immunity

In *Streit*, the Ninth Circuit once again attempts to limit the scope of available immunities. This time the erosion of protection occurs in the context of the denial of Eleventh Amendment immunity where a local sheriff institutes policies regarding the release of inmates from incarceration. This ruling is in direct conflict with *McMillian*, *Pitts*, and *Peters*. *See* Argument 1, *supra*. Like *Navarro* and *Saucier* before it, *Streit* constitutes an attempt by the Ninth Circuit to inject the federal judiciary into the affairs of sovereign states by limiting the availability of immunity defenses. It cannot be allowed to survive.

B. The Insidious Effect of *Streit*

Although *Streit* attempts to resolve the various legal issues raised, the opinion actually creates more problems than it solves. Some of the areas implicated include expanding federal litigation, forum shopping, and violations of notions of state sovereignty. Worse yet, the opinion appears to be result-oriented and designed to ensure that an injured plaintiff, who has other available remedies, is allowed to file a suit under 42 U.S.C. § 1983.

(1) Expanded Federal Litigation and Forum Shopping

By refusing to follow California law on this issue, *Streit* guarantees that previously over-worked federal judges will become even more burdened. Currently, many claims alleging violations of civil rights under 42 U.S.C. § 1983 are filed in state courts, where *Peters* is binding. The *Streit* opinion, on the other hand, is binding upon all federal trial courts sitting in California. *See Jones-Hamilton v. Beaser Materials & Servs.*, 973 F.2d 688, 696 n. 4 (CA9 1992). These contradictory approaches will increase confusion and inconsistent outcomes, depending solely on whether the plaintiff files his or her action in state or federal court. Such an inconsistent application of law will result in "forum shopping" as savvy plaintiff's attorneys will opt to file their lawsuits in federal court to circumvent established California law, increasing the caseload of an already over-crowded federal judiciary.

Worse yet, the district courts will not be alone in their sudden increase in activity. Because this issue is

subject to an interlocutory appeal pursuant to 28 U.S.C. § 1292, every adverse decision by a district court will be subject to immediate review by the Ninth Circuit. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). Based on this procedural reality, as well as language in *McMillian* and *Streit* which repeatedly calls for a "case by case" analysis of the issues presented, *Streit* at 560, 564 n. 13; *McMillian* at 795, the Ninth Circuit will become the *de facto* court of original jurisdiction for all civil rights cases involving sheriffs in the entire State of California.

Presently there are dozens of cases involving similar allegations pending in Los Angeles County alone. There are even more cases involving related issues, such as excessive force, jail security, and assorted law enforcement functions. The prospect of similar lawsuits in each of the 58 counties is a sobering reality. The federal judiciary will be faced with the unenviable task of engaging in a case-by-case analysis of literally hundreds, and perhaps thousands, of cases throughout the State of California.

(2) State Sovereignty

One of the most insidious results of *Streit*'s analysis is the profound impact it has on state sovereignty. By circumventing California's determination that the sheriff acts on the state's behalf, *Streit* makes the federal courts the final arbiter of who works for the state of California. This opinion is in direct conflict with *McMillian*'s proviso that "[s]tates have wide authority to set up their state and local governments as they wish." *McMillian* at 795.

The attempt to inject federal courts into a state's decision-making process regarding whether an individual acts on its behalf should not be taken lightly. This is especially so where the California courts repeatedly have held that a sheriff is a "state actor," and the Legislature has not taken any contrary action in response to this interpretation. Under these circumstances, the federal judiciary should not attempt to second-guess the State's legitimate determinations about the meaning of California law.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* respectfully urges the Court to grant the Petition for Certiorari and to hold that, for the purposes of determining *Monell* liability under 42 U.S.C. § 1983, California sheriffs act on behalf of the State of California when establishing policies and practices for releasing prisoners from incarceration.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 3 2001
CLERK

No. 00-1863

In The

Supreme Court of the United States

COUNTY OF LOS ANGELES and
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

vs.

VALERIE ANN STREIT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE CASE

Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001), is a thoughtful, well-founded and routine application of the principles set forth in *McMillian v. Monroe County*, 520 U.S. 781 (1997), for determining which government officials are final policymakers for entity defendants sued under 42 U.S.C. § 1983. The Ninth Circuit, like other courts publishing decisions on the issue, experienced no difficulty applying *McMillian*. No significant conflicts have developed among the federal or state courts. In short, the standards of rule 10 have not been met and this petition should be denied.

Streit arises from interlocutory appeals in a number of related cases alleging that Los Angeles County Sheriff's policies and practices unreasonably delayed releases from the Los Angeles County Jail. The Ninth Circuit affirmed the trial court's denials of motions for summary judgment and motions to dismiss brought by petitioners County of Los Angeles and Los Angeles County Sheriff's Department. It rejected petitioners' contention that a California sheriff acts on behalf of the State when managing a county jail, thus permitting respondents to maintain claims against petitioners pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978).[1] *Streit* and the related cases remain pending in the trial court, with no trial date set.

McMillian examined specifics of Alabama law and held that an Alabama sheriff, when engaged in a law

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[1] There are other federal and state claims for relief pending in the district court that are not related to the issues raised in the certiorari petition.

enforcement function, acts on behalf of the state rather than a county. *McMillian*, however, rejected "a uniform, national characterization for all sheriffs," noting that "States have wide authority to set up their state and local governments as they wish," and that "the importance of counties and the nature of county government have varied historically from region to region, and from State to State." 520 U.S. at 795. Since "both the role of sheriffs and the importance of counties vary," "sheriffs [may] be county officers in one State, and not in another." *Id.* at 795. Moreover, *McMillian* recognized that sheriffs, like other officials, may perform a wide range of functions, and for some of those functions the sheriffs may be the "final policymakers for the local government," but in other areas may "represent[ ] the state." *Id.* at 785-86.

Streit too considered the role of a sheriff, but in a different state – California – and a different function – jail management.[2] Using the *McMillian* framework, it

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[2] The cases decided thus far under *McMillian* have identified at least four distinct sheriff functions: (1) operating county jails, *see, e.g., DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000), (2) investigating crimes and other law enforcement duties, *see e.g., Spurlock v. Sumner County*, 42 S.W.3d 75 (Tenn. 2001), (3) employing, retaining and promoting employees to carry out the functions of the Department, *see, e.g., Jeffes v. Barnes*, 208 F.3d 49 (2d Cir.), *cert. denied sub nom. County of Schenectady v. Jeffes*, 531 U.S. 813 (2000), and (4) staffing state courts as bailiffs and executing their writs, warrants and other orders, *see, e.g., Alencastro v. Sheahan*, 297 Ill.App.3d 478, 698 N.E.2d 1095 (1998). Without question, the function at issue in this case is jail management, but petitioners repeatedly refer to it as "law enforcement." (*See, e.g.*, Pet. Cert. at i (misleading question presented), 10, 14 and 15).

determined that in California the sheriff is generally a county official, and that in California jail management is a matter of local policymaking and control. *Streit* identified the considerable differences between the respective roles of sheriffs in Alabama and California governments, and stressed that the California legislature gives its county governments broad fiscal and administrative powers over the management of jails, Cal. Gov't Code § 25303, as well as the power to take jail management away from the Sheriff altogether, *id.* § 23013.[3] Significantly, *Streit* recognized that long before *McMillian*, the California Supreme Court, in *Sullivan v. County of Los Angeles*, 12 Cal.3d 710, 717, 527 P.2d 865, 868, 117 Cal.Rptr. 241, 244 (1974), imposed tort liability on the County for the sheriff's failure to release people from county jail in a timely fashion. *Streit*, 236 F.3d at 561-62.[4]

Petitioners urge the Court to grant certiorari, contending that *Streit* conflicts with *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80

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[3] Both the petition and the amicus brief omit discussion of § 23013 and do not mention the California appellate decision upholding a county's transfer of jail responsibilities away from its sheriff, *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 251 Cal.Rptr. 444 (1988), despite *Streit*'s reliance on both the statute and the case. *See* 236 F.3d at 561.

[4] Both the petition and the amicus brief omit any mention of *Sullivan*, the controlling California Supreme Court case on county liability for over detention of county jail inmates, despite the Ninth Circuit's noting the opinion to be of "particular importance to our analysis." 236 F.3d at 562.

Cal.Rptr.2d 860 (1998) (sheriff acts for state when incarcerating someone on arrest warrant), an intermediate California appellate decision on an interlocutory writ arising from the overruling of a demurrer to a complaint. (*See* Pet. Cert. 7, 22). Because *Peters* was not rendered by a "state court of last resort," however, any conflict between *Streit* and *Peters* would not meet the standards of rule 10(a). Moreover, while there are some differences in the language of the two cases, there is no conflict between their holdings; *Streit* and *Peters* apply *McMillian* to different functions performed by California sheriffs. The decisions in both *Streit* and *Peters* are in accord with dozens of state and federal decisions in California and elsewhere which hold that sheriffs and their deputies are generally county officials, but act on behalf of the state when faithfully carrying out court orders.[5]

The petition for certiorari does not challenge that portion of *Streit* affirming the trial court's conclusion that the Sheriff's Department is a separate suable entity not entitled to Eleventh Amendment immunity. *Streit*, 236 F.3d at 565-67. Even were the sheriff not acting on behalf of the county when over detaining respondents, as urged in the petition, the Sheriff's Department remains exposed

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[5] In *Streit*, one central issue is the sheriff's failure to timely release from jail people ordered released by a state court. Obviously, a sheriff does not act on behalf of a state court when engaging in policies and practices that contravene and frustrate the state court's orders. The situation in *Peters* – where the sheriff attempted to carry out a court order requiring the detention of an individual – presents the exact opposite of the situation in *Streit* – where the sheriff's policies frustrated court orders to release respondents.

to *Monell* liability. Because California law provides that judgments against the sheriff are paid by the county,[6] were this petition granted and the portion of the *Streit* opinion which permits respondents to pursue their *Monell* claims against the County reversed, the posture of the parties would be largely unchanged.

The petition for writ of certiorari should be denied.

ARGUMENT

I. *STREIT* CORRECTLY APPLIED *McMILLIAN* AND DETERMINED THAT IN CALIFORNIA SHERIFFS MANAGE JAILS ON BEHALF OF COUNTIES.

In *McMillian*, the Court, analyzing Alabama constitutional, statutory and decisional law, concluded that for section 1983 purposes Alabama sheriffs are policymakers for the state, and not their respective counties, when performing law enforcement functions. In doing so, the Court identified several unique and historically specific aspects of Alabama law that influenced its decision and directed the lower courts to conduct state-by-state and function-by-function inquiries when applying *McMillian* in other situations.

Unlike California and many other states, Alabama expressly makes its sheriffs members of the State Executive Committee, along with the Governor and other statewide officials. *McMillian* relied primarily on the "historical development" of the Alabama Constitution, especially

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[6] Cal. Gov't Code § 815.2.

the turn-of-the-century amendments which incorporated sheriffs into the executive branch of the state government. 520 U.S. at 786.

These amendments demonstrated "the framers' intent to ensure that sheriffs be considered executive officers of the state." 520 U.S. at 789 (citing *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987)). The purpose of these amendments was to "solidify the place of the sheriffs in the executive department, and to clarify that sheriffs were acting for the State when exercising their law enforcement functions." *Id.* at 788. There are reasons peculiar to the deep south for Alabama's including sheriffs in state government. "Historically, Alabama county sheriffs were squarely placed under state control to stop them from assisting lynch mobs in killing black prisoners." *Streit*, 236 F.3d at 561 n. 11.[7]

McMillian's holding does not create a blanket rule that sheriffs are state policymakers in other states. "[T]here is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another." 520 U.S. at 795. "A court's task is to 'identify those officials or governmental bodies who speak with *final policymaking authority* for the local governmental actor *concerning the action* alleged to have

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[7] Reflecting historical development in the opposite direction from Alabama's, constitutional amendments in California decentralized power over the sheriff and reinforced county control. In 1970 California deleted constitutional provisions giving the State Legislature authority to define the sheriff's duties, while retaining the provisions giving counties that power. *See Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 796, 251 Cal.Rptr. 444, 448 (1988).

caused the particular constitutional or statutory violation at issue.' " *Id.* at 784-85 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (emphasis added).

Significantly, when the petitioner in *McMillian* pointed out to the Court that "most Federal Courts of Appeals have found county sheriffs to be county, not state, officials," the *McMillian* Court saw no danger that its conclusion regarding Alabama "will either call these decisions into question or create an unacceptable patchwork of rulings as to section 1983 liability of counties for the acts of their sheriffs. We reject both arguments: The first ignores the history of sheriffs, and the second ignores our Nation's federal nature." *Id.* at 793. While the Court differed over the result of *McMillian's* analysis, the Justices agreed that "[t]he Court's opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers" and that the decision emanated from a "recognition of the historic reasons why Alabama listed sheriffs as members of the State's 'executive department.' " *Id.* at 805 (Ginsberg, J., dissenting).

Following the *McMillian* methodology, the *Streit* court analyzed California's constitutional structure and contrasted it with that of Alabama to determine whether the California sheriff in general makes policy for the state or the county:

> Unlike the Alabama Constitution, the California Constitution does not list sheriffs as part of "the state 'executive department.' " *McMillian*, 520 U.S. at 787, 117 S.Ct. 1734 (finding this designation "especially important" for determining liability). Instead, . . . the California Constitution

> designates sheriffs as county officers. . . . *[S]ee also DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 976 (7th Cir. 2000) (noting that the Illinois Constitution's designation of sheriffs as county officers "strongly indicates that the Sheriff is an agent for the county, and not the State"). Indeed, "[n]ot only does the California Constitution lack the provisions most important to the Supreme Court's decision in *McMillian*, its provisions read much like those of the Alabama Constitution prior to that State's determined effort to clarify that sheriffs were acting for the State when exercising their law enforcement functions." *Roe v. County of Lake*, 107 F.Supp.2d 1146, 1149 (N.D. Cal. 2000); *see McMillian*, 520 U.S. at 788, 117 S.Ct. 1734. Thus, under the California Constitution, the [Sheriff's Department] is generally a county, not state, agency.

236 F.3d at 561 (footnote omitted).[8]

In concluding that California sheriffs generally act for their counties rather than the state, *Streit* deemed it a "crucial factor" that "[u]nder California law, monetary damages for section 1983 claims are paid by the County and not the state." *Id.* at 562 (citing Cal. Gov't Code § 815.2 and *McMillian*, 520 U.S. at 789 ("strong evidence in favor of the . . . conclusion that sheriffs act on behalf of the State" that Alabama law makes suit against sheriff

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[8] *Streit*'s observation that California sheriffs generally act on behalf of their counties is consistent with the decentralized, "home rule" operating principle of California government. *See Dibb v. County of San Diego*, 8 Cal.4th 1200, 1206-19, 884 P.2d 1003, 1006-15, 36 Cal.Rptr.2d 55, 58-67 (1994) (general purpose of state constitutional provisions is to grant "home rule" to counties by means of charters).

suit against state, and county not liable for acts of sheriff)).[9] Placing emphasis on which entity is financially responsible under state law is consistent with analogous Eleventh Amendment jurisprudence. The "vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

Streit did more than determine that California sheriffs generally act on behalf of counties. *Streit* examined jail management, and determined that it too was a county function.

> The California Government Code also supports the conclusion that the [sheriff's department] operates for the County when administering local prison policy. Although the California Attorney General, like the Alabama Attorney General in *McMillian*, has statutory control over the sheriffs in a law enforcement capacity, in California, the counties hold the ultimate power

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[9] In addition to this statute, *Streit* noted other statutes that demonstrate California sheriffs are county policymakers, not state officials.

> In California, sheriffs are elected county officers. . . . Sheriffs are required to have their offices at the county seat with the other county officers . . . ; their vacancies are filled as "provided by law for filling elective county offices;" . . . and their services are contracted out by the counties – not the state. . . . These various state provisions lead inexorably to the conclusion that the [sheriff's department] is tied to the County in its political, administrative, and fiscal capacities. Therefore, the County appears subject to liability for the [sheriff's department]'s actions.

236 F.3d at 562 (footnote omitted).

> over the jails. *Compare* Cal. Gov. Code § 12560 (granting the Attorney General power over the sheriffs' activities relevant to the "investigation or detection of crime"), *with* Cal. Gov. Code § 25303 (granting the county boards of supervisors broad fiscal and administrative powers for the management of the individual county jails so long as the boards do not "obstruct the investigative function of the sheriff of the county"). The counties retain the power to transfer control of a county jail from the sheriff to a county-created department of corrections, suggesting that the counties actually control and operate the jails, and not the state via the sheriffs. Cal. Gov. Code § 23013; *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 793, 251 Cal.Rptr. 444, 445 (1988). We find that sections 23013 and 25303 weigh heavily in favor of our conclusion that the [sheriff department]'s jail-release policies are a county function and a county concern. *See Dotson v. Chester*, 937 F.2d 920, 928 (4th Cir. 1991) (interpreting a Maryland statute virtually identical to section 23013 and concluding that because "state statutes confer authority on the counties to transfer control of the jail from the sheriff to a county warden," it has "no doubt but that sheriffs are final policymakers *for counties* when operating jails" (emphasis added)). Thus, under these state statutes, the County, not the state, oversees the local jails, and the [sheriff's department], as the administrator of those jails, acts for the County.

Id. at 561-62.

Petitioners contend that *Streit* conflicts with California case law. That is not so. California courts have long

acknowledged that county jails generally are the responsibility of the county, *e.g., Reed v. Hammond*, 18 Cal.App. 442, 123 P. 346 (1912), *cited in* 52 Ops. Cal. Att'y Gen. 228, 230 (1969), and that counties may be held liable for failure "to appropriate sufficient funds" for jail management. *Brandt v. Board of Supervisors*, 84 Cal.App.3d 598, 600, 147 Cal.Rptr. 468, 469 (1978). The California Supreme Court, in a state tort case for money damages for an alleged over-detention in the Los Angeles County Jail – a case factually on all fours with this one – held that "if the county sheriff is liable as a public employee . . . for his alleged failure to release plaintiff from jail after all charges against him were dismissed, then the county will be derivatively liable for those acts." *Sullivan v. Los Angeles County*, 12 Cal.3d 710, 717, 527 P.2d 865, 869, 117 Cal.Rptr. 241, 245 (1974) (footnote omitted).[10]

Streit follows the line of Ninth Circuit cases holding California counties liable under section 1983 for constitutional deficits in their sheriffs' jail administration. Examples of *counties* being exposed to liability for policies in *jails* managed by their sheriffs – cases legally on all fours with this one – include *Henry v. County of Shasta*, 132 F.3d 512, 518 (9th Cir. 1997) (practice of submitting recalcitrant motorists to unpleasant jail conditions), *amended*, 137 F.3d 1372, *cert. denied sub nom. Pope v. Henry*, 525 U.S. 819 (1998), *Redman v. County of San Diego*, 942 F.2d 1435, 1455

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[10] In contrast, long before § 1983 liability became an issue there was an established line of Alabama cases holding that a suit against the sheriff was "essentially a suit against the state." *See, e.g., Montiel v. Holcombe*, 199 So. 245 (Ala. 1940); *Parker v. Amerson*, 519 So.2d 442, 445 (Ala. 1987).

(9th Cir.) (practice not to segregate "aggressive" homosexuals from vulnerable detainees), *cert. denied*, 502 U.S. 1074 (1991), and *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1460-61 (9th Cir. 1988) (affirming judgment against county because "its administrative organ, the Men's Central Jail" was deliberately indifferent to psychological needs of prisoner who, as a consequence, hanged himself), *cert. granted and remanded on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir.), *cert. denied*, 494 U.S. 1091 (1990).

In sum, *Streit* was correctly decided in light of *McMillian* and apposite state and federal precedent. Accordingly, there is no reason for the Court to review the case now.

II. *STREIT* IS CONSISTENT WITH OTHER STATE AND FEDERAL CASES APPLYING THE *McMILLIAN* ANALYSIS.

A. Cases Arising In California

There are six published decisions in addition to *Streit* applying *McMillian* to California sheriffs and two applying it to district attorneys. These holdings do not conflict, and do not suggest that the Court should grant certiorari to clarify the law.

Two district court opinions pre-dating *Streit* held that a county has section 1983 liability for its sheriff's jail management policies. *Von Colln v. County of Ventura*, 189 F.R.D. 583 (C.D. Cal. 1999) (strapping inmates into inhumane "chair"); *Leon v. County of San Diego*, 115 F.Supp.2d 1197 (S.D. Cal. 2000) (indifference to inmates' medical needs). Similarly, there are two district court opinions holding counties have section 1983 liability for their sheriffs' law enforcement practices. *Brewster v. County of*

Shasta, 112 F.Supp.2d 1185 (E.D. Cal. 2000) (investigating crimes); *Roe v. County of Lake*, 107 F.Supp.2d 1146 (N.D. Cal. 2000) (responsiveness to female crime victims).[11]

In *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (C.D. Cal. 1999), *rev'd in part on other grounds*, 251 F.3d 1230 (9th Cir. 2001) (deputy sheriff acting as bailiff activated electric belt on order of judge to shock pro per criminal defendant), on the other hand, the district court held that sheriff, when setting policy for the deputy sheriffs who staff the state's superior courts, acted as a

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[11] *Roe* contains an excellent *McMillian* analysis.

> Recognizing that local police power is derived from the State, *McMillian* requires a court to analyze the delegation of that power to determine whether it was sufficiently complete such that a suit for abuse of that power is not a suit against the State. It seems clear from the analysis above that California's delegation of authority to [the county sheriff] is sufficiently complete. It is difficult to see how a judgment against a sheriff who, as is alleged here, permits his office to violate the civil rights of women in the way he maintains his staff and sets his policies, will operate as a judgment against the State. The fact that the sheriff is subject to supervision by the Attorney General does not alter this. Whatever the reality of the functional supervision that the Attorney General exercises over local sheriffs, [the sheriff] is ultimately supervised in Lake County, at least for the policies at issue here. The deterrent effect of paying any judgment plaintiff may obtain will be felt in Lake County. If the public is dissatisfied with the way [the sheriff] treats women victims, he will either not be reelected by the voters of Lake County or he will be impeached before a Lake County grand jury. It is hard to see how any of this will violate California's sovereignty.

107 F.Supp.2d at 1151-52.

policymaker for the state rather than the county. These five cases illustrate the function-by-function approach *McMillian* requires and *Streit* employed.

The California Supreme Court, in *Pitts v. County of Kern*, 17 Cal.4th 340, 345, 949 P.2d 920, 923, 70 Cal.Rptr. 823, 826 (1998), applied *McMillian* and decided that "a California district attorney acts on behalf of the state . . . when preparing to prosecute and while prosecuting criminal violations of state law, and when establishing policy and training employees in these areas." The Ninth Circuit independently reached the same conclusion in *Weiner v. County of San Diego*, 210 F.3d 1025 (9th Cir. 2000).[12] In both cases, the courts stressed the quasi-judicial role played by prosecutors as well as California's

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[12] Both petitioners and their amicus cite *Weiner* with approval (Pet. Cert. at 12-13 n. 6, Amicus Br. at 4-5), although it rejects their central contention that under *McMillian* federal courts must parrot state-court conclusions.

> In *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920 (1998), the California Supreme Court, following *McMillian*, analyzed California law and held that a district attorney was a state official for purposes of § 1983 liability while acting in his prosecutorial capacity. *See id.* at 928-34. The California Supreme Court is the ultimate interpreter of California state law. *See Johnson v. Fankell*, 520 U.S. 911, 916, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997). This does not mean, however, that we must blindly accept its balancing of the different provisions of state law in determining liability under § 1983.
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> In *McMillian*, the Court stated that "our inquiry is dependent on an analysis of state law," which does not mean "that state law can answer the question for us by, for example, simply labeling as a state official

long history of treating district attorneys in their prosecutorial role as state officials. *See, e.g., Weiner*, 210 F.3d at 1030 ("In 1894, the California Supreme Court held that the district attorney . . . '[i]n the prosecution of criminal cases . . . acts by the authority and in the name of the people of the state.' *Modoc County v. Spencer*, 103 Cal. 498, 37 P. 483, 484 (1894).").

Contrary to the petition and the amicus brief, *Weiner* is limited to the function of criminal prosecutions. "Although a California district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes." *Id.* at 1031; *accord Pitts*, 17 Cal.4th at 363 ("Our conclusion as to which entity the district attorney represents might differ were plaintiffs challenging a district attorney's alleged action or inaction related to . . . [an] administrative function arguably unrelated to the prosecution of state criminal law violations."); (*but see* Pet. Cert. at 11 ("[D]istrict attorneys are controlled by the State, not the County."); Brief of Amicus Br. at 3 ("Consistent with the California Supreme Court's decision in *Pitts*,

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> an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's function under relevant state law." *McMillian*, 520 U.S. at 785, 117 S.Ct. 1734 (emphasis added). We must, therefore, examine California's constitution, statutes, and case law.

210 F.3d at 1028-29.

the Ninth Circuit has ruled that district attorneys act on behalf of the State of California and are consequently immune from liability under Section 1983.")).[13]

Finally, there is the intermediate appellate decision in *Peters* on which petitioners and their amicus place so much weight.[14] That case did not involve allegations that

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[13] The California Supreme Court's full quote in *Pitts* from 1894's *Modoc County v. Spencer*, partially quoted in *Weiner*, 210 F.3d at 1030, distinguishes the district attorney's role as a law officer – a county function – from the district attorney's role as a prosecutor – a state function.

> The district attorney in the discharge of his office performs two quite distinct functions. *He is at once the law officer of the county and the public prosecutor of the state.* While in the former capacity he represents the county and is largely subordinate, and under the control of, the board of supervisors, he is not so in the latter. In prosecution of criminal cases he acts by the authority and in the name of the people of the state.

Pitts, 17 Cal.4th at 359 (emphasis added) (quoting *Modoc County v. Spencer*, 103 Cal. 498, 37 P.483, 484 (1894)).

[14] Petitioners argued below that *Peters* controls the outcome of respondents' § 1983 claims in federal court. *Streit* properly rejected that contention. "The elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, 496 U.S. 356, 375 (1990). State law is relevant only to the extent it provides the subject matter for analysis. If there is a "substantive disagreement" under state law about "the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." *Id.* at 377-78. The reason is obvious.

> If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983

the county jail routinely over detained people ordered released. "The function involved" in *Peters* "is determining whether to release a person who may be subject to arrest on an outstanding warrant." *Peters*, 68 Cal.App.4th at 1177.[15] The warrant was, of course, a court order directing the Sheriff to take the person into custody. Because the sheriff was involved in carrying out the orders of the court, the *holding* of *Peters* harmonizes with the other California-based decisions discussed above.

In any event, *Peters* does not represent a definitive or reliable statement of California law. *Peters* failed to address salient state statutes, key decisions from the California Supreme Court and the distinctions the California Supreme Court made in *Pitts*. *Peters* (like petitioners and their amicus) did not mention *Sullivan v. County of Los Angeles*, the 1975 California Supreme Court case holding that under state law counties are vicariously liable for jail over-detentions caused by policies or acts of the Sheriff's

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> liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People

Id. at 382. "A construction of [§ 1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . . The immunity claim is a question of federal law." *Martinez v. California*, 444 U.S. 277, 283 n. 3 (1980).

[15] Both the district court and the court of appeals distinguished *Peters* on this basis. *Streit*, 236 F.3d at 564; Pet. Cert. App. B at B9 (Memorandum Order Denying Motion to Dismiss, filed March 25, 1999).

Department. *Peters* did not address California Government Code section 23013, the statute giving county governments the power to strip the sheriff of jail management responsibilities. *Peters* did not address the distinction between the prosecutorial function and the law officer function for which the California Supreme Court in *Pitts* cited *Modoc*, a central component of *Pitt's* analytical framework.[16] These flaws in *Peters* suggest the sort of "blatant effort to shield . . . local governments from liability" cautioned against in *McMillian*. *See* 520 U.S. at 796.

B. Cases Arising In Other Jurisdictions.

In the brief time since *McMillian* was decided, the lower federal and state courts have applied its analysis to a wide variety of cases involving sheriffs. If there is a pattern emerging, it is that when sheriffs are engaged in jail management, law enforcement, or personnel administration, courts are more likely to find that they are local policymakers, recognizing that Alabama's change in law to incorporate its sheriffs into the state government does not generally parallel laws in other states. On the other hand, when sheriffs faithfully execute court processes – such as writs or warrants – courts generally find that sheriffs act on behalf of the state, much like prosecutors

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[16] This distinction between prosecutorial and law officer functions is mirrored in California's immunity law; there is absolute immunity for malicious prosecution, whether by the prosecutor or a police officer, and potential liability for false arrest and imprisonment. *See Asgari v. City of Los Angeles*, 15 Cal.4th 744, 937 P.2d 273, 63 Cal.Rptr.2d 842 (1997).

do. In other words, the lower courts have adhered to the Court's direction that the question of state-versus-local authority be resolved on a state-by-state and function-by-function basis, and appear to have encountered little difficultly doing so.

1. Jail Management and Administration

Noting that *McMillian* recognized that a sheriff's policymaking capacity would vary from state to state, courts not addressing Alabama law have uniformly found that sheriffs are local officials regarding jail policies. *See Ramsey v. Schauble*, 141 F.Supp.2d 584 (W.D.N.C. 2001); *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973 (7th Cir. 2000) (Illinois). In contrast, *Turquitt v. Jefferson County*, 137 F.3d 1285 (11th Cir.), *cert. denied*, 525 U.S. 874 (1998), applied the *McMillian* analysis to Alabama and recognized that even though *McMillian* had concluded that Alabama sheriffs were state policymakers for law enforcement purposes, a new examination had to be performed for the jail-management function. *Turquitt* concluded that the reasons underlying the unusual role of sheriffs in Alabama state government made sheriffs state policymakers in their jail management function as well as in their law enforcement function.

2. Law Enforcement.

Several courts outside Alabama have determined that, in exercising law enforcement functions, the sheriff is a local or county policymaker. For example, in *Abraham v. Piechowski*, 13 F.Supp.2d 870 (E.D. Wis. 1998), the court,

after noting that "*McMillian* recognized that the importance of counties and the nature of county government may vary from state to state, which can impact a court's characterization of the sheriff," found that under the Wisconsin law (a statutory and constitutional framework like that of California, originally derived from the laws of New York) the sheriff was a local policymaker. *Id.* at 879. Similar decisions have been made in Tennessee, *Spurlock v. Sumner County*, 42 S.W.3d 75 (Tenn. 2001), and Illinois, *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999). Under Texas law a sheriff is a county law enforcement policy maker. *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999). The Fourth Circuit has, upon careful analysis in light of *McMillian*, reaffirmed its view expressed in *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997), that North Carolina sheriffs are local policy makers for law enforcement purposes. *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001). In *Open Inns, Ltd. v. Chester County Sheriff's Department*, 24 F.Supp.2d 410, 413 (E.D. Pa. 1998), the court found a sheriff's policy of allowing deputies to assist private parties in seizing personal property without "any inquiry into the legality of such actions" ("don't ask, don't think") to be that of a local policymaker.

On the other hand, *Fletcher v. Georgia*, 92 F.Supp.2d 1377 (S.D. Ga. 2000), applied *McMillian* and decided that Georgia had "cede[d] to counties no meaningful level of control over a sheriff's law enforcement activities," *id.* at 1380, and that Georgia sheriffs are not county policymakers. Given their proximity and shared history, it is

not surprising that Alabama and Georgia would have similarities in their governmental structures.[17]

3. Employment and Personnel Policies

Several courts have found that in matters of employment and personnel policies, sheriffs who have the power to hire, fire and discipline department employees act in a local policymaking capacity. *See, e.g., Jeffes v. Barnes*, 208 F.3d 49 (2d Cir.), *cert. denied sub nom. County of Schenectady v. Jeffes*, 531 U.S. 813 (2000); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999); *Aleman v. Milwaukee County*, 35 F.Supp.2d 710 (E.D. Wis. 1999).

4. Staffing Courts and Executing Process

In *Alencastro v. Sheahan*, 297 Ill.App.3d 478, 698 N.E.2d 1095 (1998), the court was confronted with a suit arising from the service of an eviction writ. The court found that "the defendant was a state actor in executing the court order for possession," relying on Illinois law

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[17] *McMillian* cited a study "explaining how regional influences have resulted in different forms of county government in different States" and listing Alabama in the lowest third of all states in the amount of discretionary authority granted to its counties. 520 U.S. at 795. The same study places Georgia near the lowest third, while California is in the upper third, the group of states granting the most discretionary authority to counties. De Santis & Renner, *Governing the County*, in *County Governments in an Era of Change* 19, Table 2.1 (P. Berman ed. 1993).

requiring that "sheriffs shall serve and execute all warrants, process, orders, and judgments of every description that may legally be directed or delivered to them." *Id.* at 483, 698 N.E.2d at 1099.

These and other cases[18] decided in the four years since *McMillian* underscore *McMillian's* clarity and the uniformity with which its analysis has been applied – even though, as should be the case in light of *McMillian's* analytical framework, the outcome varies from state-to-state and from function-to-function.

III. LIABILITY OF THE SHERIFF'S DEPARTMENT – ITSELF A SEPARATE SUABLE ENTITY – IS NOT ADDRESSED BY THIS PETITION

In *Streit*, the Ninth Circuit found that the Los Angeles Sheriff's Department is a separate entity separately subject to suit, 236 F.3d at 565-66, and rejected the claim that it is an "arm of the state" immune from liability under the Eleventh Amendment, *id.* at 566-67. Thus, the court below held that the sheriff could be sued in his

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[18] *McMillian* has also been applied to decide whether particular officials other than sheriffs are state or local policymakers. *Burge v. Parish of St. Tammany*, 187 F.3d 452 (11th Cir. 1999) (holding district attorneys to be local); *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir.) (same), *cert. denied sub nom. Roe v. Carter*, 528 U.S. 1005 (1999); *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998) (district attorney's blanket policy of not accepting cross-complaints in criminal cases was local, despite the fact that district attorneys would be immune from liability for *initiating* prosecutions), *cert. denied*, 525 U.S. 1146 (1999); *Pharris v. Looper*, 6 F.Supp.2d 720 (M.D. Tenn. 1998) (holding county assessors to be local).

official capacity for the policies applied at the county jail *either* as a final policymaker for the county *or* as a final policymaker for the sheriff's department. In the petition for writ of certiorari, petitioners challenge only the determination that the sheriff is the final policymaker for the county, and do not object to *Streit*'s determination that the sheriff's department is subject to *Monell* liability arising from jail management practices.

Other circuits recognize that a sheriff who might not be, under the applicable state scheme, a county official, is not therefore necessarily a state official. The argument that a sheriff who is not a county policymaker therefore represents the state "overlooks a crucial third possibility that we have found to be dispositive in other cases – namely that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects." *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 976 (7th Cir. 2000) (citing *Franklin v. Zaruba*, 150 F.3d 682, 685 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999)); *see Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000) (county not liable for employment decision of sheriff, but sheriff liable in his official capacity as head of the sheriff's department, an independent non-state entity subject to suit).

Because petitioners do not challenge the decision below insofar as it finds that the sheriff's department is a separately liable local entity, and because the sheriff is the final policymaker for the sheriff's department, the matter will proceed on the merits even if certiorari is granted

and the finding with respect to the county is reversed. For this reason too, certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondents urge the Court to deny the petition for certiorari.

DATED: Pasadena, California, August 3, 2001

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Supreme Court, U.S.
FILED
AUG 17 2001
CLERK

No. 00-1863

In The

Supreme Court of the United States

COUNTY OF LOS ANGELES and
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,

Petitioners,

vs.

VALERIE ANN STREIT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTORY STATEMENT

Petitioners County of Los Angeles and Los Angeles County Sheriff's Department ("petitioners") hereby file their reply brief in support of their Petition for Writ of Certiorari ("Petition") filed with this Court on June 12, 2001. The Petition was placed on the docket on June 13, 2001, and seeks review of the decision of the United States Court of Appeals for the Ninth Circuit, which held, in contravention of a prior decision by the California Court of Appeal, that sheriffs in California *generally* act on behalf of the counties and *particularly*, when setting jail policies concerning release of prisoners, for section 1983 purposes.

Since *McMillian v. Monroe County*, 520 U.S. 781 (1997), where this Court unequivocally stated that the question of whom an official has policymaking authority for is wholly dependent on an analysis of *state law*, there have been two decisions by the United States Court of Appeals for the Ninth Circuit, one decision by the California Supreme Court and one decision by the California Court of Appeal involving whether a particular county officer is a policymaker for the state or county government for purposes of section 1983. *See Pitts v. County of Kern*, 17 Cal.4th 340, 949 P.2d 920, 70 Cal.Rptr. 823 (1998) (When preparing to prosecute and when prosecuting criminal violations of state law and when training and developing policy in these areas, district attorneys in California represent the state and are not policymakers for the counties.); *Weiner v. San Diego County*, 210 F.3d 1025 (CA9 2000) ("All relevant California cases, including *Pitts*, have held that district attorneys are state officers for the purpose of investigating and proceeding with criminal prosecutions."); *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), *review denied* (March 17, 1999) (Where the Los Angeles County Sheriff acts as a state officer performing law enforcement duties by setting policies concerning release of persons

from county jails, he acts on behalf of the state, not County.); *Streit v. County of Los Angeles*, 236 F.3d 552 (CA9 2001) (The Los Angeles County Sheriff acts as a policy-maker for the County of Los Angeles, not the state, in administering jail policy concerning release of prisoners.)

Contrary to respondents' contention, there is nothing "well-founded" nor "routine" about the Ninth Circuit's rationale and determination in *Streit* that sheriffs in California generally act on behalf of the counties and in particular, when administering jail policy concerning release of prisoners. Up until the *Streit* decision, California federal courts confronting the issue were far from clear as to whether California sheriffs act on behalf of the counties in performing either law enforcement duties or other functions for section 1983 purposes. The published opinion in *Streit* does nothing to settle this important area of law. Indeed, one of the fundamental problems with the *Streit* opinion is that it does not provide any meaningful guidance as to the differentiation between law enforcement versus non-law enforcement functions. By simply labeling the function at issue as "jail management" and thereafter concluding that it is more akin to an administrative task, the Ninth Circuit simply failed to recognize that when sheriffs are operating the jails, they are acting as correctional officers and carrying out punishment duties which are under the supervision of the Attorney General, not the local government entity. Moreover, respondents' suggestion that a distinction should be made between enforcing the laws under the State of California and placing those who violate the laws of the state behind bars would be nonsensical and would impose local government liability under the most arbitrary circumstances. Neither the Ninth Circuit, nor respondents, provide any basis to make any meaningful analytical distinction between these two functions.

I. BY COMPLETELY MISCONSTRUING CALIFORNIA STATUTES, THE NINTH CIRCUIT HAS CREATED AN IRRECONCILABLE CONFLICT WITH A DECISION OF THE STATE APPELLATE COURT ON VIRTUALLY THE SAME ISSUE.

The California trial courts have had no trouble following the analytical framework set out by the California Supreme Court in *Pitts* and the appellate court in *Peters*, both of which correctly applied the principles set forth by this Court in *McMillian*, for determining which government officials are final policymakers for entity defendants sued under section 1983.

Rather than squarely addressing the issue presented in the Petition, respondents mistakenly contend that because *Peters* was not rendered by a "state court of last resort" any conflict between *Streit* and *Peters* would not meet the standards of Rule 10(a). (Opp. Brief at 4.) This Court has repeatedly held that a conflict between the decision of a federal court of appeal and either the state's highest court or state intermediate courts of appeal is an appropriate basis for review. *See Six Companies v. Highway District*, 311 U.S. 180 (1940); *West v. American T & T Co.*, 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940). Indeed, allowing federal courts to ignore state precedent regarding the interpretation of state law allows federal courts to mischaracterize state law, among other things.[1]

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[1] In holding that the sheriff was a county official for purposes of general law enforcement duties, at least one federal district court has recognized that its holding was directly contrary to the holdings in factually and legally similar cases decided by the California Court of Appeal and California Supreme Court in *Peters* and *Pitts*, respectively. *See Brewster v. County of Shasta*, 112 F.Supp.2d 1185, 1191 (E.D. Cal. 2000).

A. Neither California Government Code § 25303 Nor § 23013 Confer Power Or Control Upon The County Boards Of Supervisors For The Management Of The Jails.

Like the Ninth Circuit, respondents erroneously cite California Government Code § 25303 for the proposition that the county boards of supervisors have direct authority over management of the county jails. (App. at A21; Opp. Brief at 10.) That alleged authority of the boards of supervisors cannot be found in the wording of section 25303, nor in the cases interpreting it. Indeed, the California courts have explicitly held that section 25303 grants no such authority to county boards of supervisors. For instance, in *Brandt v. Bd. of Supervisors*, 84 Cal.App.3d 598, 601-602, 147 Cal.Rptr. 468, 470-471 (1978), the court stated:

> Except in rare instances, the board of supervisors has no direct authority over the jail, and even where direct authority is given, its exercise is made discretionary by statute. [Citing Government Code § 25380 pertaining to the construction and maintenance of jail facilities in other counties and Government Code § 23013 empowering the board of supervisors to establish a county department of corrections to take over the operation of the jail in place of the sheriff]. The only clear and present duty enjoined by law upon a board of supervisors with regard to a county jail is to provide the sheriff with food, clothing, and bedding for prisoners (Pen. Code, § 4015) and to pay as a county charge other expenses incurred in the keeping of prisoners (Gov. Code, § 29602). . . . *We note that the board not only had no duty but also had no right to control the operation of the jail;* a board of supervisors has no legal authority to use its budgetary power to control employment in the operation of the sheriff's office (*see Hicks v.*

> *Board of Supervisors* (1977) 69 Cal.App.3d 228, 241 [138 Cal.Rptr. 101]). Only the sheriff has control of and responsibility for distribution and training of personnel and the specific use of the funds allotted to him.

(Emphasis added.)

Likewise, in *People v. Langdon*, 54 Cal.App.3d 384, 390, 126 Cal.Rptr. 575 (1976), the court held:

> Although the board of supervisors has authority to supervise county officers in order to insure that they faithfully perform their duties (*see* Gov. Code, § 25303), it does not have the power to perform the county officers' statutory duties for them *or to direct the manner in which the duties are performed.*

(Emphasis added.)

Eighteen years later, the California Supreme Court affirmed the correctness of the observation by the appellate court in *Langdon*:

> The *Langdon* court went on to observe, correctly, that the board of supervisors 'does not have the power to perform the county officers' statutory duties for them or direct the manner in which the duties are performed.'

Dibb v. County of San Diego, 8 Cal.4th 1200, 1209, fn.4, 884 P.2d 1003, 1008, 36 Cal.Rptr.2d 55 (1994).

In short, contrary to respondents' suggestion, there simply is no support for the Ninth Circuit's conclusion that California Government Code § 25303 grants to boards of supervisors the authority to direct the manner in which the sheriff's duties are performed. Absent the authority to control or change the release process at the jails, there cannot be section 1983 liability against the public entity defendant.

Nor does California Government Code § 23013 confer upon boards of supervisors the authority to control the sheriff's administration of the jails. Contrary to respondents' characterization of this statute, it does not provide

that a county *controls* the jail, but rather authorizes the county to relieve the sheriff of his/her power and control of the county jail to a county-created department of corrections. If the county already had control over the jails, as the Ninth Circuit erroneously concluded, this provision would be meaningless. Moreover, section 23013 in no way allows the county board of supervisors to oversee the operation of nor institute policies regarding the jail while the sheriff controls the jail, and any failure of the *Peters* court to consider this statute in this context does not dilute the reasoning or soundness of *Peters*. As such, the existence of section 23013 does not, as reasoned by the Ninth Circuit, demonstrate control by the county board of supervisors over the sheriff with regard to the jail release process. It simply authorizes a county to assume control of the jail, something it does not have absent exercise of that statutory authority.[2] Therefore, respondents' suggestion that the holding in *Peters* is somehow inconsistent with section 23013 is a fallacy.

B. The Federal District Court Cases And Other Circuit Decisions Cited By Respondents Do Not Provide Any Useful Analysis Of The Issue Presented In This Petition.

Preliminarily, respondents and the Ninth Circuit's reliance on *Sullivan v. County of Los Angeles*, 12 Cal.3d 710, 527 P.2d 865, 117 Cal.Rptr. 241 (1974) for the suggestion that because a county is vicariously liable for a tort claim

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[2] *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 251 Cal.Rptr. 444 (1988) is thus irrelevant since the county in that case had already exercised its power under section 23013. In fact, the court in *Beck* conducted a thorough analysis of the California constitution and concluded that it "defines a system of government under which the *state Legislature has paramount control over the definition of the sheriff's duties.*" *Id.*, 204 Cal.App.3d at 796 (emphasis added).

caused by acts of the sheriff's department, the county can therefore be held liable under section 1983 for the same acts, is also misplaced. *Sullivan* involved only state law claims of false imprisonment and contained no analysis of the issue before this Court, i.e., whether the sheriff is a policymaker for the state or county with regard to matters relating to the jail. *Sullivan* dealt exclusively with liability under state law, an analysis which has little if anything to do with section 1983 liability. Since the issue as to whether the sheriff is a policymaker under section 1983 for the state or county is not part of the state law analysis of a false imprisonment claim, *Sullivan* is simply irrelevant. Second, *Sullivan* was decided before this court issued its opinion in *McMillian*, where this court rejected the idea that simply labeling an officer as a state or county officer resolves the issue and that the power to set an officer's salary "does not translate into *control* over him. . . . "

Equally inapplicable are the string of federal district court cases and other circuit decisions cited by respondents which did not analyze *California's* constitutional or statutory provisions. In other words, whether a particular official has final policymaking authority is dependent on the definition of the official's particular function under relevant law of that particular state, and thus, decisions from federal or state courts of other states simply have no relevance in this case.

Moreover, the California federal district court cases cited by respondents, all of which pre-date *Streit*, do not provide any meaningful analytical distinction between what constitutes a law enforcement versus non-law enforcement function. For example, citing *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244 (C.D. Cal. 1999), *rev'd in part on other grounds*, 251 F.3d 1230 (CA9 2001) respondents acknowledge that sheriffs are state officials

when setting policies and procedures for deputies relating to carrying out the orders of judges. *Hawkins*, however, did not address whether there was any meaningful distinction between establishing policy relating to carrying out the orders of a judge and establishing policy relating to ensuring compliance with judicial orders (i.e., checking for all outstanding warrants or other holds) before releasing inmates from jail. Nor does the Ninth Circuit in *Streit* provide any meaningful basis for distinguishing enforcement of the laws under the State of California and placement of those who violate the laws of the state behind bars. Petitioners certainly do not suggest that sheriffs in California act as final policy-makers for the state and not for the local government in all the wide range of functions that sheriffs perform. Rather, despite respondents' contention, the specific function analyzed by the Ninth Circuit in *Streit* cannot meaningfully be distinguished from the function analyzed by the California Court of Appeal in *Peters*.

Thus, granting the Petition would avoid conflicts between federal and state courts on the interpretation of state law and protect principles of state sovereignty and comity.

II. WHETHER THE SHERIFF'S DEPARTMENT IS A SEPARATELY SUABLE ENTITY IS IRRELEVANT.

Recognizing that *Streit* cannot be reconciled with *McMillian*, *Peters* and *Pitts*, respondents argue that this Court need not address the Ninth Circuit's error since the ultimate result will not be changed even if it is reversed. Respondents' argument misstates petitioners' position and ignores the legal havoc created by *Streit* regardless of the ultimate outcome of the instant case.

Respondents incorrectly assert that "petitioners challenge only the determination that the sheriff is a final policymaker for the county. . . . " (Opp. Brief at 23). In

fact, petitioners challenge the Ninth Circuit's determination that sheriffs in California do **not** act on behalf of the **state** when setting policies governing the release of inmates from the jail. If the Ninth Circuit is incorrect in its interpretation of California law, then it makes no difference whether the Los Angeles Sheriff's Department ("LASD") is suable or not since the policies at issue are those of the State of California, not the County of Los Angeles ("County") or its fiscal subdivision, the sheriff's department.[3]

The *Streit* opinion confuses the elected office of "sheriff" with the department of the sheriff within the county governmental structure. *See* Cal. Govt. Code § 26600; *Hanley v. Murphy*, 40 Cal.2d 572, 575, 255 P.2d 1 (1953). The terms "sheriff" and "LASD" are used interchangeably throughout the opinion, so much so that the court refers to the LASD alternatively as a "policymaker" for the County and as an "entity" in and of itself. *See, e.g.*, App. at A7, A8, A28, A31). The court never explains how the LASD can be an "entity" in one instant and a "policymaker" for another entity the next. Indeed, neither the respondents nor the petitioners have ever suggested that the LASD could function as a "policymaker" for the County. The elected sheriff is the policymaker. (*See* Cal. Govt. Code § 26605 which mandates that the sheriff, not the sheriff's department "take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it.") The pertinent question is whether or not the sheriff sets that policy on behalf of the state. If so, that

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[3] To say that the "department" is separately suable is really nothing more than re-stating the holding of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) that a local governmental entity can be sued under section 1983 for constitutional violations caused by its policies. In this case, the Ninth Circuit has simply held that a department within a local governmental entity is also suable, a rather pointless redundancy.

policy cannot be a basis for entity liability, whether that entity is the county or its subdivision, the sheriff's department.

Finally, insofar as the LASD's entitlement to Eleventh Amendment immunity is concerned, the Ninth Circuit analyzed the same statutory and state constitutional provisions it used in finding that the sheriff does not act on behalf of the state. As with the sheriff, the court applied a functional analysis and concluded that "the LASD is not acting as an arm of the state when administrating the local county jails." (App. at A32.) It necessarily follows, therefore, that a finding that sheriffs in California act on behalf of the state in setting policies governing the jail release process would necessarily change the Eleventh Amendment analysis with regard to the sheriff's department.

CONCLUSION

Contrary to the claim of respondents, the jurisdictional conflict presented in this Petition is one that is proper and ripe for review by this Court. For the foregoing reasons, the Petition for Writ of Certiorari should therefore be granted.

Dated: August 16, 2001

Respectfully submitted,

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